

## *Parliamentary committees*

The principal purpose of parliamentary committees is to perform functions which the Houses themselves are not well fitted to perform, that is, finding out the facts of a case, examining witnesses, sifting evidence, and drawing up reasoned conclusions. Because of their composition and method of procedure, which is structured but generally informal compared with the Houses, committees are well suited to the gathering of evidence from expert groups or individuals. In a sense they 'take Parliament to the people' and allow direct contact between members of the public by a representative group of Members of the House when engaged on programs of hearings, visits or inspections. Not only do their programs enable their members to be better informed about community views but in simply undertaking an inquiry committees may promote public debate on the subject at issue. The all-party composition of most committees and their propensity to operate across party lines are important features. This bi-partisan approach generally manifests itself throughout the conduct of inquiries and the drawing up of conclusions. Committees oversee and scrutinise the Executive and can contribute towards a better informed administration and government policy-making process. In respect of their formal proceedings committees are microcosms and extensions of the Houses themselves, limited in their power of inquiry by the extent of the authority delegated to them but governed for the most part in their proceedings by procedures and practice which reflect those which prevail in the House by which they were appointed. However, joint committees operate under the standing orders of the Senate following the United Kingdom practice whereby joint committees follow House of Lords select committee procedures when such procedures differ from those of Commons select committees. Any instruction to a joint committee can only be effected by resolution agreed to by both Houses.<sup>1</sup>

### **AUTHORITY FOR THE APPOINTMENT OF COMMITTEES**

The power of the House to appoint committees is not in doubt but the source of this power, particularly in regard to investigatory committees, cannot be stated precisely. The following three sources have been suggested:

- section 49 of the Constitution on the basis that the power to appoint committees of inquiry was one of the 'powers' or 'privileges' of the House of Commons as at 1901 within the meaning of that section;
- section 50 of the Constitution on the basis that to provide by standing orders for the setting up of committees of inquiry is to regulate the conduct of the business and proceedings of the House, and
- that by virtue of the common law, the establishing of a legislative chamber carried with it, by implication, powers which are necessary to the proper exercise of the functions given to it.

<sup>1</sup> This should be remembered when reference is made in this chapter to resolutions affecting committees and to the responsibility of committees to report. Constant parenthetical references such as 'or by both Houses' would be tedious. Unless otherwise indicated it can be assumed that in any instance in which the House would be involved in the case of House committees,

both Houses would be involved in the case of joint committees. Further, where the Speaker is required to be involved, as in the appointment of members, the President would also be involved where joint committees are concerned. For a list of committees since 1901 see Appendix 24.

Section 49 of the Constitution appears to be a clear source of power, with extensive ambit, for the Australian Parliament to appoint committees of inquiry. The other sources 'could be called in aid to extend its breadth or to sustain what otherwise might be uncertain about it'.<sup>2</sup>

There is no doubt about the power of the House of Commons to appoint committees. Committees were appointed by the Commons at least as early as 1571 and, in fact, they preceded the introduction of the procedure relating to the committee of the whole House.<sup>3</sup>

There are doubts as to the precise extent of the investigatory powers which the Houses may exercise or delegate to committees. By virtue of section 49 of the Constitution the powers of the House and of committees to which it delegates these powers are those of the House of Commons at 1901. Based on this there could be a claim of unlimited powers. In 1845 Lord Coleridge said that as the 'general inquisitors of the realm' the Commons could inquire into anything it wanted to. A corollary of this was the authority to compel the attendance of witnesses.<sup>4</sup> The Commons exercised these powers in aid of both its legislative responsibilities and of its responsibility as the 'Grand Inquest of the Nation'. There was no limit to the subject matters on which the Commons could legislate and as the Grand Inquest of the Nation it considered itself entitled to advise or remonstrate with the Crown on all affairs of State and in regard to any grievance of the monarch's subjects. Thus, there was no practical limit to the subject matters into which the House of Commons could inquire at 1901. In *R. v. Richards: ex parte Fitzpatrick and Browne* the High Court held in unequivocal terms that section 49 is incapable of a restricted meaning and that the House of Representatives, until such time as it declares otherwise, enjoys the full powers, privileges and immunities of the United Kingdom House of Commons.<sup>5</sup> If such is the case, either House of the Commonwealth Parliament, or its committees, could be said to have the power to conduct any inquiry into any matter in the public interest and to exercise, if necessary, compulsive powers to obtain evidence in any such inquiry.

On the other hand, there is the view that the compulsive investigatory powers which the House may delegate to its committees is limited to matters on which the Parliament may legislate. This view was argued on the basis of a judgment by the Judicial Committee of the Privy Council in 1914. It was held that the Commonwealth Parliament could not legislate to grant a royal commission, appointed by the Commonwealth Government, power to compel witnesses to attend and give evidence before it unless the royal commission's terms of reference were limited to matters on which the Parliament could legislate.<sup>6</sup> It has been suggested that neither House could achieve by resolution that which it could not achieve by statute and that consequently the limitations on the granting of compulsive powers to royal commissions must apply equally to delegation of such powers to parliamentary committees.<sup>7</sup> However, there must be some doubt as to whether a court would find the so-called *Royal Commissions* case relevant to the question of the powers of parliamentary committees as that case was concerned with a different form of inquiring body and the exercise of a different head of constitutional power.<sup>8</sup>

2 'Parliamentary committees: powers over and protection afforded to witnesses', Paper prepared by I. J. Greenwood and R.J. Ellicott, PP 168(1972)3.

3 *Campion*, p. 26.

4 *Howard v. Gosset* (1845) 10QB.359, at pp. 379-80, quoted in PP 168 (1972) 3.

5 (1955) 92 CLR 157, pp. 164-70.

6 *A.G. (Commonwealth) v. Colonial Sugar Refining Company Ltd* (1914) AC 237.

7 Enid Campbell, *Parliamentary Privilege in Australia*, 1966, pp. 163-4; see also G. Sawyer, 'Like a Host of Archangels', in the *Canberra Times*, 7 April 1971.

8 The existence of doubt is acknowledged in D.C. Pearce, *Inquiries by Senate Committees* (1971) 45ALJ 659.

Attorney-General Greenwood and Solicitor-General Ellicott did not accept that the House has unlimited power of inquiry:

Although, for the time being, s. 49 of the Constitution has conferred on each House the powers of the Commons as at 1901, it does not, in our view, enlarge the functions which either House can exercise. In considering the effect of s. 49, it is important to bear in mind that there is a distinction between 'powers' and 'functions'. The section, as we construe it, is intended to enable the Commonwealth Parliament to declare what the powers, privileges and immunities of its Houses and their members and committees shall be for the purpose of enabling them to discharge the functions committed to them under the Constitution. What the Commons did as 'the Grand Inquest' was not done in aid of its legislative function but represented the exercise of an independent and separate function said to be as important as that which it exercised as part of the legislature. However, it would not, in our view, be proper to construe s. 49 as conferring such an important and independent function on the Australian Houses of Parliament. Not only is it unlikely that such a function would be left to implication and then only until Parliament provided otherwise but the exercise of such a function by the House of Representatives or the Senate would in some respects be inconsistent with the Constitution. For instance, the notion that either House could impeach a person for trial before the other is inconsistent with the notion that judicial power is to be exercised by the Courts as provided in Chapter III. Again, the Commons could as the Grand Inquest inquire into any matter or grievance. It would surely be inconsistent with the federal nature of our Constitution that a House of the Commonwealth Parliament could inquire into a grievance which a citizen had in relation to the execution of a law wholly within State competence.

It is our view, therefore, that neither of the Houses of the Commonwealth Parliament has been vested with the function which the Commons exercised as the Grand Inquest of the Nation. This view was also expressed by Forster J. in *Attorney-General v. Macfarlane & Ors.*<sup>9</sup>

Nevertheless, the law officers differentiated between the virtually unlimited power of inquiry and the legal limitations of the inquiry power, which would arise only when it was sought to enforce that power, for example, by compelling persons to attend a parliamentary committee. A similar view was taken by Fullagar J. in *Lockwood v. The Commonwealth*.<sup>10</sup>

Even though Greenwood and Ellicott stated that there are legal limits to the facts and matters into which the Houses can, by compulsion, conduct an inquiry, for practical purposes they also noted that these limits are extremely wide, as a consideration of the various heads of Commonwealth legislative power will quickly reveal.<sup>11</sup> They added that each House:

... is entitled to investigate executive action for the purpose of determining whether to advise, censure or withdraw confidence. It would indeed be odd if a House could not inquire into the administration of a department of State by a Minister in order to judge his competence before determining whether to advise him, censure him or withdraw its confidence in him. Each House of the Commonwealth Parliament can, therefore, in our view, as a necessary consequence of the existence of responsible government, exercise investigatory powers through committees in order to exercise what might broadly be called an advisory function.<sup>12</sup>

It may be a very long time before the courts make any authoritative judgment on these limits, if they exist. First, committees rarely use their compulsive powers but rather rely on voluntary assistance and co-operation. Secondly, political realities, conventions and courtesies arising from the federal framework of the Constitution will continue to inhibit the House and its committees from pressing hard for information on matters wholly, or even largely, within the constitutional jurisdiction

9 PP 168 (1972) 6-7.

10 (1954) 90 CLR 177 at p. 182.

11 PP 168 (1972) 9.

12 PP 168 (1972) 7.

of the States. Thirdly, the courts have been reluctant to intervene in the affairs of the Parliament, particularly with respect to parliamentary privilege and the Houses' powers to investigate and deal with alleged contempt which are the means by which the Houses compel the giving of evidence.

The method of appointment of committees varies. Some are appointed pursuant to standing or sessional orders, others by resolution of the House (or of both Houses in the case of joint committees) and others pursuant to statute.

## **TYPES OF PARLIAMENTARY COMMITTEES**

Committees appointed by the House, or by both Houses, are described in this section in the following broad categories.

### **Committee of the whole**

If a bill is to be considered in detail, the House resolves itself into a committee of the whole for this purpose. A committee of the whole may also be used for other purposes, for example, for the consideration of Senate amendments to bills.

### **Standing and select committees**

Standing committees are those that continue for the life of a Parliament (as distinct from select committees) some being appointed pursuant to standing orders and some pursuant to sessional orders or by resolution of the House. Six standing committees are referred to in the standing orders (1988), and at the commencement of each Parliament five of these, namely, the Committee of Members' Interests, the Committee of Privileges, the Library Committee, the House Committee and the Publications Committee, are appointed.<sup>13</sup> The standing order relating to the Standing Orders Committee was suspended during the 34th and 35th Parliaments because of the role being played by the Procedure Committee. The work of these committees largely relates to the operations of the House and the Parliament, but in the cases of the Committee of Privileges and the Publications Committee a broader, investigatory role is also involved. The Committee of Members' Interests was first established in October 1984 (although it did not meet in the 33rd Parliament). Its task is to inquire into and report upon the arrangements made for the compilation, maintenance and accessibility of the register of Members' interests and related matters (*and see* p. 623).

Prior to the 35th Parliament a number of subject-specific committees had been appointed by the House of Representatives, such as the Standing Committee on Transport Safety, the Standing Committee on Environment and Conservation and the Standing Committee on Aboriginal Affairs. However, in the 35th Parliament under sessional orders the House appointed eight general purpose standing committees, a Procedure Committee and a Selection Committee. The general purpose standing committees are as follows:

- Standing Committee on Aboriginal Affairs;
- Standing Committee on Community Affairs;
- Standing Committee on Employment, Education and Training;
- Standing Committee on Environment, Recreation and the Arts;
- Standing Committee on Finance and Public Administration;
- Standing Committee on Industry, Science and Technology;
- Standing Committee on Legal and Constitutional Affairs, and
- Standing Committee on Transport, Communications and Infrastructure.<sup>14</sup>

<sup>13</sup> S.O.s 25-28A.

<sup>14</sup> Sessional Order 28B.

Select committees, in Australian practice, have a more limited life which should be defined in the resolution of appointment. In short, the creation of a select committee is seen as a measure to meet a particular and perhaps short-term need, while standing committees are created with a continuing role for the life of the Parliament. The standing orders provide that, at the appointment of every select committee, a day is to be fixed by which it is to bring up its final report unless an extension of time is moved and granted in the House.<sup>15</sup> However, practice does not always accord with this provision as select committees have been appointed with the provision to report "as soon as possible".<sup>16</sup> This occurs when a committee undertakes an inquiry which can be seen to be longer-term, perhaps even extending over the life of more than one Parliament. When a select committee is directed to report by a specific date or as soon as possible, its corporate existence comes to an end as soon as it does so.<sup>17</sup>

Committees may also be given leave of the House to report from time to time.<sup>18</sup> This authorisation means that a committee is at liberty to make progress reports during the course of the consideration of the matter referred to it.<sup>19</sup> The following provision has been included in the resolution of appointment of some select committees:

That the committee have leave to report from time to time but so that its final recommendations be presented on or before [date].<sup>20</sup>

On presenting its final report the committee ceases to exist.

If a select committee finds it difficult or impossible to table a satisfactory final report by the specified date, it may be given an extension of time by the House, prior to, or on, the specified reporting date, by amendment of its resolution of appointment.<sup>21</sup>

Prior to prorogation of the Parliament in 1977, the Select Committee on Tourism, which was required to report as soon as possible, recommended to the House that in the next session it be reappointed with power to report from time to time.<sup>22</sup> It sought this power with a view to the tabling of an interim report in the next session. The recommendation was adopted by the House on the reappointment of the committee in the next Parliament.<sup>23</sup>

In 1987, when the House of Representatives restructured its committee system by appointing general purpose standing committees, the Senate re-organised its committees to parallel those of the House. In previous Parliaments resolutions of appointment usually directed standing committees, in selecting particular matters for investigation, to take account of the investigations of other parliamentary committees in order to avoid duplication. Commenting on this requirement the Standing Committee on Expenditure reported to the House in 1977:

It must be remembered that the Houses are different—constitutionally, historically, and in practice. The Parliament is an entity; the two Houses complementary parts. Thus, while the avoidance of duplication through liaison is a worthwhile objective which the

<sup>15</sup> S.O. 327.

<sup>16</sup> Select Committee on Road Safety, VP 1970-72/1030.

<sup>17</sup> Select Committees on Tourism, VP 1976-77/510, and on Pharmaceutical Benefits, VP 1970-72/304, were required to report as soon as possible. The Joint Select Committees on Aboriginal Land Rights in the Northern Territory, VP 1976-77/558, and on the Family Law Act, VP 1978-80/355, were required to report by a specified date.

<sup>18</sup> S.O. 341.

<sup>19</sup> The Select Committees on Aboriginal Edu-

cation and Aircraft Noise had power to report from time to time, VP 1985-87/59, 60.

<sup>20</sup> Joint Select Committee on Aboriginal Land Rights in the Northern Territory, VP 1977/12.

<sup>21</sup> Select Committee on Specific Learning Difficulties, VP 1976-77/273; Joint Select Committee on an Australia Card, VP 1985-87/764, 886.

<sup>22</sup> *Report from the House of Representatives Select Committee on Tourism*, PP 4 (1977)5.

<sup>23</sup> VP 1977/11.

Committee will attempt to achieve it points out that this may not stop a Senate or House committee from covering the same ground, if each committee felt compelled to on the grounds of public interest.<sup>24</sup>

Committees of the House and the Senate are careful to avoid duplication, for example, in inquiries by the House Standing Committee on Aboriginal Affairs and a Senate select committee in 1988, there was considerable potential for duplication, but the two committees concentrated on different matters.

The terms of reference of select committees tend to be much narrower and more specific and presuppose a single inquiry and report. In fact, as already indicated, most select committees are required to produce only one report. Nevertheless, the resolutions of appointment of some select committees have given the relevant Minister power to refer additional matters to them, that is, before they report and cease to exist.<sup>25</sup> A select committee with an unqualified power to report from time to time can elect to present a series of reports on particular aspects of its terms of reference.

Current inquiries of all House and joint committees are listed on the Notice Paper.

### **Joint committees**

Joint committees draw their membership from both Houses and can also be divided into two groups, namely, those appointed pursuant to the provisions of an Act of Parliament, that is, statutory committees, and those appointed pursuant to resolutions of both Houses and which can stand for the life of a Parliament or be appointed to investigate a single issue. Those committees appointed under an Act of Parliament are required to be established at the commencement of each Parliament. In most cases the Act makes provisions for their terms of reference, powers and procedures. The statutory committees are the Joint Committee on the Broadcasting of Parliamentary Proceedings, the Parliamentary Joint Committee on the Australian Security Intelligence Organization, the Parliamentary Joint Committee on the National Crime Authority, the Parliamentary Standing Committee on Public Works and the Joint Committee of Public Accounts. In the case of the Parliamentary Joint Committee on the National Crime Authority, all matters relating to the powers and proceedings of the committee shall be determined by resolution of both Houses of the Parliament.<sup>26</sup> The Act specifies the duties of the committee but each House has to resolve all other matters pertaining to the workings of this particular committee.

Joint standing and joint select committees operate in a similar manner to standing and select committees outlined in the previous section. In the 35th Parliament joint standing committees were appointed on Foreign Affairs, Defence and Trade; Electoral Matters; and the New Parliament House. As at the end of 1988 joint select committees had been appointed on Video Material and Corporations Legislation.

### **Unofficial committees**

In addition to the categories of parliamentary committees described above there are a further three categories of committees consisting of Members and Senators which operate within the Parliament. They differ from those already described in

24 'A Year's Experience', *Report from the House of Representatives Standing Committee on Expenditure*, PP 244 (1977)22.

25 Joint Select Committees on Aboriginal Land

Rights in the Northern Territory (VP 1977/12) and on the Family Law Act (VP 1978-80/354-5).

26 VP 1987-89/88.

that they are not appointed by either House and therefore do not enjoy the special powers and privileges of such committees and do not necessarily operate in accordance with parliamentary procedures and practice. They are thus parliamentary committees only to the extent that their members are Members of Parliament; they are not committees of the Parliament.

Committees consisting of Members and Senators have been appointed by the Government of the day, especially during World War II.<sup>27</sup> Membership has included members of the Opposition. The committees' reports were submitted to the Government and subsequently tabled in one or both Houses. The practice of appointing such committees has not been continued.

In 1980, the Speaker announced his intention to appoint a 'Speaker's Committee' to report on whether the Westminster conventions concerning the continuity of the Speakership could be adopted by the House, the method of doing so, and when the system should commence. The announcement followed an informal ballot conducted by the Clerk, on the Speaker's behalf, to determine whether Members supported the establishment of such a committee. The majority of those who participated in the ballot favoured the establishment of a committee but the Opposition, as a party, did not support the ballot as it saw a need for a more comprehensive review of the parliamentary institution. The Speaker indicated that the terms of reference of the committee would be those contained in the ballot and that the committee was to report to the Speaker and, through him, to the House. The Speaker wrote to each of the three party whips asking for the nomination of a specified number of members from each party, the numbers being proportionate to each party's representation in the House.<sup>28</sup> The committee had not been established when the 31st Parliament was dissolved.

Again in 1980, the Speaker and the President of the Senate announced in their respective Houses that they had agreed to establish Presiding Officers' committees, comprised of six Members of each House with representatives from both sides in each House. The two committees were to meet jointly to consider and to advise the Presiding Officers on the accommodation problems confronting the Parliament. The Speaker announced his intention to write to the leaders of all parties in the House immediately after the general election, which was to be held in October 1980, to supply names of Members willing to serve on his committee. The President made a similar announcement.<sup>29</sup> The committees were established in the 32nd Parliament.

In the 35th Parliament, following the establishment of the Parliamentary Information Systems Office, the Speaker and the President decided to establish informal committees to assist them by,

- commenting on the information systems requirements of Members and Senators;
- advising on the allocation of system priorities, and
- monitoring the performance of the Parliamentary Information Systems Office regarding service to Members and Senators.

The Speaker's committee comprised six Members of the House of Representatives drawn from both sides of the House.

The government and opposition parties each have committees of private Members to assist them in the consideration of legislative proposals and other issues of political significance allied to each committee's function. These party committees are discussed in the Chapter on 'House, Government and Opposition'.

27 VP 1905/73; PP 36 (1906).

28 H.R.Deb.(22.5.80)3059-61; VP 1978-80/1527.

29 H.R.Deb.(18.9.80)1501; S.Deb.(18.9.80)1324.

**SELECT AND STANDING COMMITTEE OPERATIONS AND PROCEDURES**

The procedures and practice followed by select committees, unless the House otherwise orders, are also applied to standing committees both of the investigatory type and those appointed by standing order which relate to the operations of the House.

Joint select and standing committees, other than statutory committees, follow the Senate standing orders which differ little from those of the House. The differences are outlined under 'Joint committees' (*see* p. 626). Where significant precedents affecting joint committees are equally relevant to House committees, as they are in most cases, they are used in this section as precedents for House practice.

Joint statutory committees, with the exception of the Parliamentary Joint Committee on the National Crime Authority, operate under the provisions of their individual statutes. Their procedures and practice are dealt with under 'Joint statutory committees' (*see* p. 632).

**Appointment**

The standing orders do not prevent any Member moving a motion for the appointment of a committee of the House<sup>30</sup>, but most motions brought to a successful vote are moved by a Minister.<sup>31</sup>

The sessional orders or resolution of appointment usually define the nature and limits of the authority delegated to each committee by the House. They contain the committee's terms of reference and powers and may contain directions which the House wishes to give, for example, in relation to procedures. A resolution may modify or extend the provisions of the standing orders and it is standard practice to include the following paragraph:

That the foregoing provisions of the resolution, insofar as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

The powers and procedures of select and standing committees appointed by resolution have been varied from time to time as experience with committee operations has increased and shown the need for change, and to meet particular circumstances. Because of these variations and because of the range of discretions available to committees in their day-to-day operations, few, if any, generalisations about the powers and procedures of committees appointed by resolution hold true for every such committee. To determine the extent of the authority delegated to any committee recourse must be had to the standing and sessional orders, a committee's resolution of appointment and any later amendments, and any other orders agreed to by the House subsequent to the committee's appointment.

The standing orders provide that the original resolution of appointment may subsequently be amended by the House by way of instruction.<sup>32</sup> However, this method has never been used and amendments have usually been initiated directly or indirectly by the committee itself. Normally a committee seeks an amendment through the Leader of the House or the Minister associated with the committee's field of inquiry. If the proposed amendment has the Government's support, the Leader of the House or the responsible Minister then moves for its adoption by the House.<sup>33</sup> It is rare for the chairman of the committee to move such an amendment.<sup>34</sup>

30 S.O. 323.

31 The Select Committee on Specific Learning Difficulties was appointed on motion moved by the Leader of the Opposition, VP 1974-75/286 *see also* VP 1970-72/147-8; VP 1962-63/549.

32 S.O. 302.

33 VP 1974-75/380 (change in number of Members appointed to Select Committee on Specific Learning Difficulties).

34 VP 1920-21/377 (time of reporting extended for Select Committee on Sea Carriage).



Motions for controversial or unusual amendments have occasionally been preceded by the tabling of a special report by the committee in which the need for the amendment has been explained.<sup>35</sup> Amendments have included extension of time for reporting<sup>36</sup>, alteration of quorum size<sup>37</sup>, extension of powers<sup>38</sup>, change in the number of Members<sup>39</sup>, and extension of the terms of reference.<sup>40</sup>

## Eligibility to serve on committees

### *Personal interest*

No Member may serve on a committee if that Member is personally interested in its inquiry.<sup>41</sup> 'Personal interest' has been interpreted in the very narrow sense of an interest peculiar to a particular person. If, for example, a Member were a producer of beef he or she would not, for that reason alone, be under any obligation to disqualify himself or herself from serving on a committee inquiring into beef prices, as the interest would be one held in common with many other people in the community.

The provision of the standing orders was given proper effect in 1955 when a member of the Committee of Privileges took no active part during an inquiry in which he was personally interested in that he was the Member who had raised the complaint. In 1978, the House resolved that a member of the Committee of Privileges be discharged from attendance on the committee during its consideration of a matter that he had raised in the House. Another Member was appointed to the committee for the duration of the inquiry.<sup>42</sup>

On the appointment of members to the Select Committee on Grievances of Yirrkala Aborigines, a Minister on a point of order asked whether a Member, who had been nominated to serve on the committee should be excluded from the committee because the Member was a litigant in related court proceedings. The Speaker stated:

... the Chair is not able to determine whether or not a member is personally interested in a committee's inquiry and cannot properly be called upon to so decide. A member must be guided by his own feelings in the matter and by the dictates of respect due to the House and to himself. Having regard to the existence of the standing order and its terms, it is likely that if a matter of this kind is brought to issue it will be one for the House to decide.<sup>43</sup>

The Member served on the committee.

In other instances members of committees have themselves decided not to participate in an inquiry or a facet of an inquiry because of conflict of interest considerations. In 1977 a member of the Joint Committee on the Australian Capital Territory chose not to take part in proceedings of the committee whilst items in which that member had in investment interest were under discussion. In 1981 a member of the Joint Committee of Public Accounts did not take part in that part

35 VP 1954-55/225 (special report from the Committee of Privileges seeking power for committee to investigate matters not referred to it by the House) *see also* 'Resolution of appointment of the Committee', *Special report by the Joint Committee on the Parliamentary Committee System*, PP 78(1976)5, which sought power to retain as chairman the chairman of the committee in the previous Parliament (the report was not adopted by the House).

36 VP 1983-84/156; 1985-87/764, 886.

37 VP 1987-89/123.

38 VP 1974-75/358.

39 VP 1987-89/123.

40 VP 1983-84/124; 1985-87/87, 675.

41 S.O. 326. Between 1984 and 1988 an obligation was imposed on Members to declare 'relevant interests' at the beginning of a speech in the House or in a committee, or after a division in which the Member proposed to vote was called.

42 VP 1978-80/35; *see also* H.R. Deb. (7.4.59)903; H.R. Deb. (18.3.59)772-3.

43 VP 1962-63/559; H.R. Deb. (19.9.63)1176-9.

of an inquiry dealing with the ACT Schools Authority because the member had chaired the Authority in the past.<sup>44</sup>

### *Suspension from the House*

A Member suspended from the service of the House may take part in committee proceedings (but not the committee of the whole) during the period of suspension.<sup>45</sup>

## **Membership**

The standing orders require that all select committees shall consist of the mover of the motion appointing the committee and other Members to be nominated.<sup>46</sup> In practice, it is rare for the mover, usually a Minister, to become a member of the committee.

Committee service is considered to be one of the parliamentary duties of private Members. However, office holders and Ministers have not normally served on committees other than the Standing Orders Committee, the Committee of Privileges, and select or standing committees appointed to consider matters affecting the Parliament.<sup>47</sup> Standing order 325 provides that, except with their consent, the Speaker or the Chairman of Committees may not be chosen to serve on any committee appointed by resolution.<sup>48</sup>

The sessional orders or resolution of appointment specify the number of members to serve on a committee and how they are to be nominated. For some time resolutions of appointment provided that the leaders of the respective parties to be represented on the committee were to nominate specified numbers of members. In 1979, all resolutions of appointment were amended to provide for a specified number of members to be nominated by either the Prime Minister, the Leader of the House, or the Government Whip and a further specified number to be nominated by either the Leader or Deputy Leader of the Opposition or the Opposition Whip.<sup>49</sup> The purpose of the change was to facilitate the nomination of members to committees.<sup>50</sup> In 1987, the sessional orders and resolutions of appointment were further amended to provide for a specified number of members to be nominated by the appropriate Whips only. These changes were introduced after consultation with the Whips and the frontbench Members of both the Government and the Opposition concerned with the program of business.

Each party's representation on a committee is equated as nearly as possible to its numerical strength in the House. The members to be nominated are normally elected or selected within the party. As required in the sessional orders or the resolution of appointment, those responsible for nominations convey them to the Speaker in writing and the Speaker announces the names of nominated Members in the House. The nominees thereby become members of the relevant committee and no motion is required in the House.

An unusual situation arose in 1952 because of the Opposition's declared intention not to nominate members to serve on the proposed Joint Committee on Foreign Affairs. The resolution of appointment transmitted from the House was amended by the Senate to provide:

44 *Report 193 of the Joint Committee of Public Accounts*, PP 84 (1982)vii.

45 See Ch. on 'Control and conduct of debate'.  
46 S.O. 323.

47 The Chairman of Committees was chairman of the Joint Committee on the Parliamentary

Committee System and was a member of several general purpose standing committees in the 35th Parliament.

48 S.O. 325.

49 VP 1978-80/637-9 and see VP 1980-81/48.

50 H.R. Deb. (22.2.79)289.

That the persons appointed for the time being to serve on the Committee shall constitute the Committee notwithstanding any failure by the Senate or the House of Representatives to appoint the full number of Senators or Members referred to in these resolutions.

The House agreed to the modification.<sup>51</sup>

Provision is rarely made for *ex officio* membership of committees other than committees appointed under standing orders. However, the chairman of the Standing Committee on Expenditure was an *ex officio* member of the Joint Committee of Public Accounts and vice versa.<sup>52</sup> This arrangement was intended to ensure adequate liaison between the two committees.<sup>53</sup> *Ex officio* members, including a Minister, also served on the Joint Standing Committee on the New Parliament House.<sup>54</sup>

During the 27th Parliament the Joint Select Committee on the New and Permanent Parliament House consisted of 21 members, including several *ex officio* members, among whom were the Presiding Officers, the Prime Minister and the Leader of the Opposition. Some *ex officio* members were empowered to appoint a Member of the House or a Senator to attend the committee when they were unable to be present at a meeting. This delegate, when attending committee meetings, was deemed to be a member of the committee.<sup>55</sup> Appointment of such delegates had to be notified in writing to the Speaker and the President. The Prime Minister appointed a delegate.<sup>56</sup>

On several occasions a resolution of appointment of a committee has specified that the membership be identical to that of its predecessor in the previous Parliament.<sup>57</sup>

## Vacancies

A vacancy on a committee may occur for the following reasons:

- resignation for personal reasons;
- resignation on appointment as a member of the Ministry or to any other office as may preclude membership of a committee, for example, election to the office of Speaker or Chairman of Committees;
- resignation due to personal interest in an inquiry;
- resignation from the House, or
- death.

A Member seeking to resign from a committee submits a written resignation to the person in his or her party responsible for nominating members to the committee concerned and the chairman of the committee. If the resignation is accepted, the selection of a replacement is decided within the party. The person to whom the resignation was submitted then informs the Speaker, in writing, of the change and the Speaker announces it in the House. No motion is necessary. The occurrence and the filling of a vacancy are normally announced in the House at the same time.<sup>58</sup>

The standing orders provide that Members may be discharged from serving on a committee, and other Members appointed, after notice has been given in the House.<sup>59</sup> However, in practice, this procedure applies only to joint statutory com-

51 J 1951-53/145-6; VP 1951-53/273,278.

52 *Public Accounts Committee Act 1951*, s.5. The Chairman of the Joint Committee of Public Accounts could nominate in his place a member of that committee who was a Member of the House of Representatives.

53 H.R. Deb. (27.6.76)2613.

54 VP 1987-89/39-40.

55 VP 1964-66/495-6,512; VP 1967-68/210,216; VP 1969-70/14,29.

56 VP 1964-66/569; VP 1967-68/229.

57 Joint Select Committee on Parliamentary and Government Publications, VP 1964-66/25-6,27.

58 VP 1978-80/441.

59 S.O. 324.

mittees, committees appointed pursuant to standing orders and any other committees whose members are appointed by the House itself on motion. Only the House can discharge and replace them.<sup>60</sup>

### **First meeting**

The standing orders provide that the mover of the motion for establishment of a committee shall fix the time for its first meeting.<sup>61</sup> As the mover is usually a Minister who is unlikely to become a member of the committee, this standing order is rarely applied.

If it is left to a committee to elect its own chairman, the committee secretary must call the first meeting. It is the secretary's responsibility to inform the members in writing of the time and place of the first meeting. If the chairman is appointed, for example by the Prime Minister, it is technically the chairman's responsibility to call the first meeting.

The first meeting cannot be held until the nominations of members have been formally notified to the Speaker (and to the President of the Senate in the case of joint committees) by the Whips in accordance with the sessional orders or the resolution of appointment. Nevertheless, it is the practice that a committee may conduct its first meeting prior to membership being announced in the House once the Speaker has been formally notified of nominations.

Unless the chairman has been appointed, the committee secretary takes the chair at the commencement of the first committee meeting. The first item on the agenda is the formal announcement, by the committee secretary, of the formation of a duly constituted committee and of its membership. The second item is the election of a chairman which is conducted by the committee secretary. The chairman, upon election, takes the chair and conducts the election, if required, of the deputy chairman. The remainder of the agenda is at the committee's discretion.

### **Chairman**

Standing order 331 provides that:

Every committee, before the commencement of business, shall elect one of its Members to be chairman, who shall have only a casting vote.

In practice the sessional orders or the resolution of appointment now normally provide that the committee shall elect as chairman a government member.<sup>62</sup> Some resolutions of appointment have provided that the Prime Minister 'nominate' or 'appoint' one of the government members of the committee as chairman.<sup>63</sup> The resolution of appointment of the Joint Standing Committee on the New Parliament House provided for the Speaker and the President of the Senate to be joint chairmen of the committee.<sup>64</sup>

In conducting the election of the chairman, the committee secretary calls for nominations, each of which must be seconded. If only one member is nominated, as is usually the case, the secretary declares the member elected as chairman and invites that member to take the chair. If more than one member is nominated, the election is conducted by secret ballot in accordance with the procedures set down for the election of the Speaker in similar circumstances.<sup>65</sup>

60 VP 1978-80/56,159.

61 S.O. 330.

62 Sessional orders 28B and 28C; VP 1987-89/85, 86.

63 VP 1973-74/123-4; *see also* VP 1970-72/33; VP 1961/48.

64 VP 1987-89/39-40.

65 S.O. 12. *See* Ch. on 'The Speaker, the Chairman of Committees and Officers'. A ballot was conducted for the election of the chairman of the Standing Committee on Expenditure following its reappointment in the 32nd Parliament.

In 1974, the Select Committee on Specific Learning Difficulties was appointed without any provision in the resolution of appointment for the election or nomination of the chairman.<sup>66</sup> Under the standing orders any member of the committee, including an opposition member, could have been elected chairman. The committee had six members, three each from the government and opposition parties, which raised the possibility of a deadlock in the event of both a government and an opposition member being nominated and being supported on party lines. Before the committee held its first meeting, the House amended its resolution of appointment to increase its membership to seven by providing for an additional member to be nominated by the Prime Minister, thus giving the government party a majority. If the committee had met before this amendment was agreed to and had elected a government member as chairman, the opposition members would have had a majority of three : two in any division taken on party lines because the chairman was only empowered to exercise a casting vote.

In 1976, the Joint Committee on the Parliamentary Committee System, in a special report to the House, sought an amendment of that part of the resolution of appointment which provided that the chairman be elected by the committee from the members nominated by the Prime Minister or the Leader of the Government in the Senate. The committee wished to re-elect as chairman the member who had been chairman of the committee in the previous Parliament but who was now an opposition member. The committee argued that continuity in the chairmanship would facilitate finalisation of the committee's report.<sup>67</sup> The House took no action on the proposal.

## **The relative roles of Speaker and chairman or presiding member of a committee**

### *Procedural authority*

The powers of a chairman of a select committee are described by *May* as being substantially the same as those of the chairman of a committee of the whole House.<sup>68</sup> As no appeal can be made to the Speaker regarding the decisions and rulings of the Chairman of Committees in a committee of the whole, it follows that no appeal can be made regarding the decisions and rulings of a chairman of a select or standing committee. Formal authority over select and standing committee procedures therefore lies with the chairman and the committee itself, and the Speaker may not take formal notice of committee proceedings insofar as purely procedural matters are concerned. A chairman's procedural authority in a committee is as exclusive as that of the Speaker in the House.

While the Speaker's advice is occasionally sought on complex procedural matters, there is rarely any scope for the Speaker to intervene on committee procedures. The Speaker would normally interfere in such matters only if they were of general significance or affected the allocation of resources to a committee, which is largely the Speaker's responsibility. Nevertheless, Speakers' rulings on procedural matters are significant as precedents. Further, committee chairmen must have regard to the practice of the House where this is applicable to committee proceedings, for example, in respect of the sub judice convention (see p. 662).

Any concern about committee procedure or authority can be brought to the attention of the House in a special report, a dissenting report or in a debate on a motion that the House take note of a report. While these courses have been

66 VP 1974-75/286-7. For an explanation see H.R. Deb. (28.11.74)4233.

67 VP 1976-77/119; PP 78(1976).

68 *May*, p. 691.

adopted, no action has been taken by the House.<sup>69</sup> It is, in any case, doubtful as to whether the Speaker, rather than the House, could exercise any authority in such a situation. In 1955, the Speaker replied to questioning on the extent of the powers and functions of the Committee of Privileges:

Such questions should not be directed to the Speaker; they are matters for the House, not for me. I am not a member of the Committee of Privileges. As the House appointed the committee, the House must answer questions in relation to it.<sup>70</sup>

Unlike the Speaker, the chairman of a committee plays both an active and a procedural role at hearings and deliberative meetings. A chairman's rights to take part in proceedings are no less than those of other members except that in divisions the chairman may only exercise a casting vote.<sup>71</sup>

#### *Administrative authority*

Prior to the 33rd Parliament resolutions of appointment of committees included a paragraph 'That the committee be provided with all necessary staff, facilities and resources'. The Speaker's statutory powers made the occupant of the office the final arbiter, subject to the will of the House itself, of what constituted a 'necessary' provision. An even older form of the above paragraph 'That Mr Speaker provide the committee with all necessary staff, facilities and resources', also fell into disuse. The Speaker's statutory powers are clearly exclusive in these areas and a lack of a reference to the Speaker in resolutions of appointment or sessional orders does not diminish either the Speaker's authority or obligations. In exercising these responsibilities the Speaker would be obliged to interfere in committee operations where it was considered a committee was using or seeking resources for activities which exceeded its delegated authority.

The Speaker, or an officer appointed by the Speaker, has exclusive authority to approve expenditure for supplies, works, stores and services, incidental to the running of the House.<sup>72</sup> The only statutory limitation on this power is the amount of the relevant vote in the Appropriation (Parliamentary Departments) Acts. In 1944, three members of the Joint Committee on Social Security resigned from the committee in protest at the Speaker's insistence that a parliamentary officer replace an officer of the Public Service who had earlier been seconded to serve as clerk to the committee with the consent of the Speaker and on the recommendation of the committee. No action was taken by the House to question the Speaker's exercise of his authority to appoint committee staff but some Members expressed disapproval.<sup>73</sup>

The Speaker leaves most administrative decisions to the committees themselves although a continual oversight of operations, administration and expenditure is maintained. In instances involving unusual or large expenditures the Speaker's approval is always sought, such as the appointment of specialist advisers and the payment of expert witnesses. In the case of a proposed overseas visit by a committee, the Speaker's support is first sought. If the Speaker endorses the proposal, an approach is then made to the Prime Minister. Depending on the circumstances and merit of a case the Speaker may approve travel to Australia's external Territories and has approved visits to Pacific countries near Australia, such as New Zealand<sup>74</sup> and Papua New Guinea<sup>75</sup>, subject to funds being made available by the Government.

69 See for example the dissent of A.J. Forbes in 'A proposed system of committees for the Australian Parliament', *Interim Report of the Joint Committee on the Parliamentary Committee System*, PP 275(1975)95-7; see also the dissent of G.M. Bryant and L.R. Johnson in *Report of the Joint Select Committee on Aboriginal Land Rights in the Northern Territory*, PP 351(1977)72; H.R. Deb. (18.8.77)419,423.

70 H.R. Deb. (7.6.55)1438.

71 S.O. 331.

72 *Audit Act 1901*, Finance Regulation 48.

73 H.R. Deb. (29.3.44)2203-24; S. Deb.(30.3.44) 2281-91.

74 The Standing Committee on Environment and Conservation in 1975.

75 The Standing Committee on Aboriginal Affairs in 1978.

The chairman of the committee has a responsibility for administration arising from committee operations but requires the authority of the committee for any significant decisions or actions involving matters of principle. The chairman is advised and assisted in fulfilling both administrative and procedural responsibilities by the secretary to the committee.

Some joint committees are serviced by the Department of the Senate. In those instances the role and powers of the President of the Senate are similar to those of the Speaker.

## Deputy chairman

The sessional orders and most resolutions of appointment provide for a deputy chairman to be elected by the committee.<sup>76</sup> However, it has been provided on other occasions that the chairman appoint a member of the committee as deputy chairman 'from time to time', that is, as circumstances demand. The same member is not necessarily appointed each time.<sup>77</sup>

The deputy chairman, whether appointed or elected, is normally an opposition member. The resolution of appointment of the Joint Committee on the Parliamentary Committee System in fact directed that the committee elect as deputy chairman one of the members nominated by the Leader of the Opposition. The deputy chairman was also to be a member from a different House from the chairman.<sup>78</sup>

Immediately upon election at the committee's first meeting, the chairman conducts the election of a deputy chairman, if it is required by the sessional orders or standing orders or the resolution of appointment. The procedure is the same as for the election of the Chairman of Committees.<sup>79</sup>

The deputy chairman acts as chairman at any time when the chairman is not present at a meeting of the committee. At any time when the chairman and deputy chairman are not present the committee is required to elect another member to perform the duties of the chairman at that meeting.<sup>80</sup>

## Meeting procedures

### Sittings

A committee may adjourn from time to time and may sit during any sittings or adjournment of the House.<sup>81</sup> Committees of the House make much use of meetings during sittings of the House (although interrupted from time to time by calls for divisions or quorums in the House). Senate committees need the authorisation of the Senate to do any more than deliberate during sittings of the Senate and with most joint committees this Senate rule is followed so as to prevent meetings at which evidence is taken during Senate sittings.

Committees normally adjourn to an agreed date or to a date to be fixed by the chairman or presiding member. If a meeting is known to be the committee's last, it adjourns *sine die*. If the committee adjourns to a specific date, and a change in the date is subsequently found to be necessary, it is incumbent upon the chairman to ensure that members are notified and given reasonable notice of the new date which

76 General Purpose Standing Committees, VP 1987-89/83-4.

77 Standing Committee on Road Safety, VP 1974-75/51-2; Select Committee on Aircraft Noise, VP 1970-72/33-4.

78 VP 1976-77/59-60.

79 S.O. 13. See Ch. on 'The Speaker, Chairman of Committees and Officers'.

80 VP 1987-89/83.

81 S.O. 333.

is fixed by the chairman. (For the practice in joint committees, particularly in regard to the initiation of meetings by committee members, see p. 628).

If there is disagreement within the committee concerning the appropriateness of adjourning at a particular time, the matter should be determined by resolution of the committee. However, in circumstances of grave disorder, the chairman may suspend or adjourn the meeting without putting a question. These practices reflect those of the House itself.<sup>82</sup>

#### *Committee meetings outside Parliament House*

Committees are usually authorised to move from place to place. Without this authorisation a committee can only meet outside Parliament House, Canberra, by special order of the House.<sup>83</sup> In 1968, two such orders had to be made by both Houses in relation to the Joint Committee on the Australian Capital Territory whose resolution of appointment did not contain this authorisation. Each motion passed by the Houses limited the authorisation to the committee's current inquiry.<sup>84</sup> The committee's resolution of appointment was amended soon afterwards to avoid the need for these cumbersome procedures.<sup>85</sup>

On relatively rare occasions, committees, or their subcommittees, are permitted to travel overseas. The main principle to be considered, in relation to a committee travelling overseas, is that the House, and therefore its committees, has no jurisdiction outside Australia. It has been considered proper for members of a committee, as a group, to make inquiries abroad and to have regard to the results of those inquiries, provided they do not purport to sit as a committee and exercise the powers delegated by the House. Subcommittees of the Joint Committee on the Parliamentary Committee System and the Standing Committee on Environment and Conservation travelled overseas in 1975. Neither held formal proceedings, but informal discussions were held and inspections undertaken. In 1968, government approval was given for overseas travel by a 'study group' of members of the Joint Select Committee on the New and Permanent Parliament House. The committee's report referred to the group's overseas visit as 'the Committee's overseas inquiry'.<sup>86</sup> In 1988 the Joint Committee on Foreign Affairs, Defence and Trade was continuing an inquiry, commenced in the previous Parliament, into the South Pacific. During that year a fact-finding parliamentary delegation was to have visited a number of South Pacific states. The Government however agreed that the subcommittee should replace the delegation. In this way the subcommittee was able to see, at first hand, the matters into which it was investigating. Leave of the House was not sought in any of the above cases.

These practices have probably been overly cautious.<sup>87</sup> It would appear that provided a committee did not attempt to exercise its powers to administer oaths, compel the giving of evidence, and so on, it could sit as a committee overseas and, with the consent of witnesses, have proceedings transcribed and published.<sup>88</sup> As proceedings would almost certainly not be privileged, witnesses would need to be informed accordingly. It would seem improper for a committee to sit, as a committee, in a foreign country without first seeking the consent of that country's government.

House committees have taken evidence on oath in Australian external territories.

82 S.O.s 49, 308.

83 S.O. 333.

84 VP 1968-69/44,53,329,339.

85 VP 1968-69/344,356.

86 'Proposed new and permanent Parliament House for the Parliament of the Commonwealth of

Australia', *Joint Select Committee on the New and Permanent Parliament House*, PP 32(1970)13.

87 For House of Commons practice, see *May*, pp. 695-6. For Senate practice, see *Odgers*, p. 497.

88 See Sir Barnett Cocks, 'Parliament Goes Abroad', *The Parliamentarian* LII, 1, 1971, p. 10.



For example, a subcommittee of the Standing Committee on Environment and Conservation took evidence on Christmas Island, and the Select Committee on Wildlife Conservation did so on Norfolk Island in 1970.

### *Inspections*

In addition to gathering formal evidence, committees frequently undertake visits or inspections, at which informal discussions take place. Such inspections permit members to familiarise themselves with places, processes, and so on, which are important to their inquiries but which cannot be adequately described in formal evidence. It is normal for at least a subcommittee to undertake inspections and for these to occur immediately after a brief formal meeting of the subcommittee.

### *Quorum*

The proceedings of a committee which meets in public or in private without a quorum are invalid. Consequently, decisions taken are not binding and, more seriously, words spoken by members and witnesses are not privileged. Any order by committee members to the committee secretary or to others has no legal authority in this circumstance.

In the absence of a quorum at the commencement of a meeting the following procedures provided for in the standing orders are followed:

If, after the lapse of 15 minutes from the time appointed for the meeting of a committee, there is not a quorum, the Members present may retire, and their names shall be entered on the minutes; and the clerk attending the committee shall issue notices for the next meeting.<sup>89</sup>

If, after a committee has proceeded to business, the number of members present falls below a quorum, the chairman must suspend the proceedings until a quorum is present or, after a reasonable period, adjourn the meeting.<sup>90</sup> This requirement is applied with common sense, and a meeting is not suspended if the quorum lapses when members leave the room for short periods. However, no vote can be taken during these periods.

The standing orders specify that the quorum of a select committee shall be three<sup>91</sup> but this requirement may be varied. The sessional orders adopted in the 35th Parliament provided that a quorum for a general purpose standing committee with a membership of 12-15 was to be six members of the committee, and this was to include four government members. For a committee of 10 or 11 members, five members of the committee were to constitute a quorum, including three government members. The Joint Committee on Foreign Affairs, Defence and Trade (30 members) has a quorum of 10, including six government members, while the Joint Standing Committee on the New Parliament House (15 members) has a quorum of five, one of whom is the President or the Speaker. In the 35th Parliament the Joint Standing Committee on Electoral Matters (10 members) had a quorum requirement of four, while the Joint Select Committee on Video Material (11 members) had a quorum provision of five.

### *Presence at meetings of Members who are not members of the committee*

A Member of the House who is not a member of a particular committee may be present when it is examining witnesses but must withdraw if requested to do so by the chairman or any member of the committee and must always withdraw when the committee is deliberating.<sup>92</sup> When present at a hearing the Member cannot put

89 S.O. 329.

90 S.O. 328.

91 S.O. 328.

92 S.O. 338.

questions to witnesses or take any other part in the formal proceedings. These restrictions can only be removed by a provision in the committee's resolution of appointment or by special order of the House. By comparison the relevant Senate standing order relating to its legislative and general purpose standing committees states:

A Senator, though not a member of a Standing Committee, may participate in its public sessions and question witnesses, unless the Committee orders otherwise, but shall not vote.<sup>93</sup>

#### *Strangers or visitors*

Standing order 337 provides:

When a committee is examining witnesses, strangers may be admitted, but shall be excluded at the request of any Member, or at the discretion of the chairman of the committee, and shall always be excluded when the committee is deliberating.

In 1976, the Speaker wrote to all chairmen of committees discouraging the attendance of Members' staff at other than public meetings of a committee or at committee inspections. The Speaker indicated that the provisions of the standing orders concerning the confidentiality of committee proceedings<sup>94</sup> militate against any person, other than a member of a committee or an officer of the House, being involved in committee proceedings which are not open to the public. Since 1976 the chairmen of House of Representatives committees have written to members of their committees in similar terms to those originally used by the Speaker.

#### *Secret committees*

No strangers, or Members who are not members of the committee, may be admitted at any time to a secret committee.<sup>95</sup> No such committee has ever been established by either House and the last one established in the House of Commons was in 1857. A secret committee was established by the Commons when, in the opinion of that House, the nature of the inquiry appeared to require such a course.<sup>96</sup>

#### *Procedures at hearings*

Hearings are normally held in public but at the committee's discretion they may be held in camera. Authority to conduct public hearings is contained in the standing order which provides that when a committee is examining witnesses, strangers may be admitted.<sup>97</sup> Hearings are frequently attended by the general public and by representatives of the media. It is standard practice for the committee secretariat to notify the media in advance of proposed hearings and to advise individuals or organisations who have asked to be informed.

The chairman or presiding member may open a hearing with a brief statement of its purpose and the background to it. The chairman may also outline the procedures to be followed by the committee. The first witness or witnesses are called to the table and they then may be required by the secretary to make an oath or affirmation (*see* p. 664). The witness then sits at the table and is usually asked to state his or her full name and the capacity in which he or she is appearing before the committee, the part the witness played in preparation of the submission on which the examination is occurring, and whether the witness wishes to propose any amendment to the submission (*see* p. 661). For the purposes of the *Parliamentary Privileges Act 1987*, the submission of a written statement by a person is, if

93 Senate S.O. 36AA(9).

94 S.O.s 337, 338, 340.

95 S.O. 339.

96 *May*, p. 701.

97 S.O. 337.

so ordered, deemed to be the giving of evidence in accordance with the statement by that person. Because of this, committees must, at the first available opportunity, resolve to receive submissions they wish to receive. Two alternatives are generally used regarding submissions. In most cases a submission is incorporated in the transcript of evidence prior to the oral evidence of the witness who made it. In other cases submissions, especially those where the witness is not required to give oral evidence, are printed in separate volumes. In each case a committee resolves to publish the submissions. Before questions are put by committee members, it is usual for the chairman to invite a witness to make a short statement to the committee.

In examining a witness, the chairman first puts, in an uninterrupted series, all questions the chairman deems essential, according to the mode of procedure agreed on by the committee. The chairman then calls on each other member, in turn, to put any other questions. The name of the member asking the question of a witness is noted and prefixed to the question in the transcript of evidence.<sup>98</sup> While procedures vary to some extent between committees, all operate on the principle that questions are asked and answered through the chair and in an orderly manner. All members are given an equal opportunity to put questions to a witness.

A member of the committee or a witness may object to a question in which case the chairman decides whether the witness should answer. If there is any dissent from the chairman's decision, the chairman will suspend the public hearing and the witness (and other strangers) withdraws while the committee determines the matter, by vote if necessary, in private.<sup>99</sup> The committee may insist on the question being answered (*see* p. 651).

In its April 1989 report *Committee procedures for dealing with witnesses* the Standing Committee on Procedure proposed the adoption by the House of the following provisions to be observed by committees of the House:

The Chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry.

Where a witness objects to answering any question put to him or her on any ground, including the grounds that it is not relevant, or that it may tend to incriminate him or her, he or she shall be invited to state the ground upon which he or she objects to answering the question. The committee may then consider, in camera, whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination, and of the reasons for it, and shall be required to answer the question in camera, unless the committee resolves that it is essential that it be answered in public. Where a witness declines to answer a question to which a committee has required an answer, the committee may report the facts to the House.

Other recommendations are quoted later in this chapter although three other proposals should be noted here:

A witness shall be given notice of a meeting at which he or she is to appear, and shall be supplied with a copy of the committee's terms of reference and an indication of the matters expected to be dealt with during the appearance. Where appropriate a witness may be supplied with a transcript of relevant evidence already taken in public.

A witness may be given the opportunity to make a submission in writing before appearing to give oral evidence.

<sup>98</sup> S.O. 336.

<sup>99</sup> S.O. 366.

A witness shall be given reasonable access to any documents or records that the witness has produced to a committee.<sup>100</sup>

During a hearing a witness may be asked to provide information or a document which is not immediately available. In such cases the witness may be asked or may volunteer to provide the information later in writing or, less often, at a subsequent hearing.

No person other than a member of the committee may question a witness during examination. No witness may question a member or any other person present but a witness may ask for clarification of a question. In 1971, the Speaker made a private ruling that specialist advisers (like committee staff) must not be permitted to question witnesses, comment on their evidence or otherwise intervene directly in formal proceedings at a public hearing. Attention was drawn to standing order 336 which, in setting down procedures for the questioning of witnesses, mentions only committee members.

Documents tendered as evidence, including maps, diagrams, or other illustrated and written material, may be incorporated in the transcript of evidence or included in the committee's records as exhibits (*see* p. 662) and are usually incorporated in any resolution to publish the transcript. Where there is no objection to the incorporation of material in the transcript, the chairman usually so orders. Hansard prepares a written transcript of evidence taken at hearings which includes submissions and exhibits ordered to be incorporated. Witnesses are given an opportunity to correct errors of fact in the transcript.

It is customary to publish evidence taken at public hearings (*see* p. 601) but witnesses may request that their evidence be taken in camera and that documents submitted be treated as confidential. Such requests are usually but not necessarily granted (*see* p. 668).

#### *Seminars, informal discussions, public meetings and workshops*

In certain circumstances a committee may consider that the procedures available for formal hearings are inappropriate for the committee's purposes. In these circumstances the committee may consider informal discussions, public meetings, seminars or workshops more appropriate. Such procedures have been used:

- to conduct preliminary discussions prior to the adoption of a formal reference;
- to permit general background discussions at the beginning of an inquiry;
- as a device for discussions on matters of interest to the committee but not the subject of a formal inquiry;
- to obtain general community views at public meetings, and
- to obtain expert advice and scrutinise it with the experts collectively.

Many committees, when able to institute their own inquiries, have undertaken preliminary discussions with individuals and interest groups prior to the adoption of a formal inquiry reference. The value of this approach is that it enables a committee to establish the need for an inquiry, develop terms of reference which reflect the issues, and ensure that an inquiry is not based on misconceptions. A similar approach is sometimes adopted at the beginning of an inquiry, providing the opportunity for organisations and individuals with varying points of view to meet with the committee and highlight the issues. This often assists a committee in determining the direction of its inquiry and subsequent public hearings may be more effective because of such preliminary discussions.

<sup>100</sup> VP 1987-89/1121.

Parliamentary committees may consider they have an interest and responsibility outside their formal inquiries, especially in the case of the general purpose standing committees appointed in the 35th Parliament. To this end committees will arrange informal discussions on areas of broad interest relating to the committee's overall area of responsibility. These informal meetings might relate to explanations of a new government policy announcement, discussions with visiting dignitaries or a briefing on topical issues. These briefings enable committee members to operate more effectively as Members of Parliament.

A procedure which has been adopted in recent times is the use of public meetings. This procedure can be used where there is widespread community interest in the inquiry and where, because of the large number of persons involved, the formal public hearing approach may be time consuming and repetitive, yet still exclude many from the committee's decision-making process. Select committees on aircraft noise, for example, held public meetings in several cities. Public meetings not only enable committee members to be exposed to community attitudes but also provide an opportunity for a large number of private citizens to put views to the committee. The Standing Committee on Community Affairs, in its inquiry in the 35th Parliament into counselling services for Vietnam veterans, conducted a series of public meetings with veterans and their families. The committee decided to adopt a strategy of informality at these public meetings to maximise involvement by interested participants and in order to communicate more directly with the public. A record of major issues raised at these meetings was kept by the secretariat and used by the committee in later proceedings.

The Standing Committee on Aboriginal Affairs has followed a practice of conducting informal discussions with Aboriginal communities and groups and a range of other community organisations during field trips in connection with its inquiries. As these discussions are not conducted under standing orders they are much more informal and allow for a much freer interchange of views than is often possible in a public hearing context. In particular, they enable Aboriginal people, who are often unwilling to submit themselves to the more formal procedures of a public hearing, to express themselves openly. Hansard produces a precis of the informal discussions which is not published by the committee.

Seminars and workshops have also been used by committees. This approach was followed by the Standing Committee on Legal and Constitutional Affairs in 1988 in relation to its inquiry into mergers, takeovers and monopolies. The committee members were able to question the majority of experts who participated and the experts could question each other directly and had immediate opportunities in the forum to both clarify the issues and explain particular opinions.

While these proceedings can be regarded as official proceedings of the committee they are not formal evidence gathering because they are not conducted in accordance with the standing orders. Such proceedings are not considered as attracting parliamentary privilege. The information obtained in this manner does not have the status of evidence. It can be used in committee reports, provided that the report indicates the manner in which the information has been obtained. Minutes or a report or both on public meetings can be included in the committee's records as an exhibit. The Hansard record of such proceedings is not normally authorised for publication although it may be incorporated into the committee's records as an exhibit. However, general or restricted distribution of such records may occur at the discretion of the committee. Care is taken to ensure that the record produced does not contain any defamatory or actionable material.

*Disorder*

Disorderly or disrespectful conduct by strangers, including witnesses, during a public or private meeting of a committee may be considered a contempt (*but see* Chapter on 'Parliamentary privilege'). In this regard a Member who is not a member of the committee is on the same footing as a stranger. Examples of disorderly or disrespectful conduct include:

- interrupting or disturbing committee proceedings;
- remaining after strangers have been ordered to withdraw;
- appearing before a committee in a state of intoxication, and
- using insulting or unseemly language before a committee.

The manner in which a committee chooses to deal with disorderly behaviour will obviously depend upon the circumstances. If a simple direction is insufficient to restore order, the committee may order strangers to withdraw or suspend its proceedings. The assistance of the Serjeant-at-Arms and staff from the Serjeant-at-Arms' office may have to be sought. If the committee is meeting outside Parliament House, it may have to adjourn its proceedings.

At a public hearing on 3 December 1981, the proceedings of the Public Works Committee were continually interrupted by interjections by members of the public attending the meeting. The chairman made a plea to those persons interjecting to indicate in writing the opinions they wished to express and then suspended the meeting for lunch. During the lunch break the chairman gave a radio interview where he indicated that if the interjections continued the meeting would continue in private. There were few interjections at the resumed meeting.

A committee may not punish a person guilty of contempt; it may only draw the circumstances to the attention of the House by special report or a statement by the chairman. The House may then deal with the matter as it thinks fit.

In 1969, a public hearing by a subcommittee of the House of Commons Select Committee on Education and Science was held at Essex University. During the hearing the proceedings were constantly interrupted by shouting and barracking from the large audience. The subcommittee persisted in taking evidence for some time but finally had to adjourn because of the uproar and disorder. Members of the audience then tried to prevent subcommittee members from leaving the room. The incidents were referred to the Committee of Privileges which held that the incidents disclosed a contempt of the House. Responsibility for dealing with those who created the disorder was left to the university authorities. The Committee of Privileges noted that neither the House nor a select committee had any power to protect select committees outside the Palace of Westminster. The Serjeant-at-Arms and the Serjeant's officers were bound to maintain order within the precincts at Westminster under the authority of the Speaker, but their duties did not extend beyond the precincts. Outside the precincts the Serjeant-at-Arms would have none of the authority exercised at Westminster. The select committee was advised that assistance which might be given by the police at meetings outside the Palace of Westminster was limited to occasions when offences against persons or property were committed, or were likely to be committed. Even if they were present, the police would not intervene to prevent heckling. The Committee of Privileges therefore advised, that where it is anticipated that disorderly conduct may impede the work of a select committee meeting outside the parliamentary precincts, its proceedings should not be in public. It was considered that Members, when acting as representatives of the House, should not expose themselves to situations they could not control and which could reflect on the authority of Parliament.<sup>101</sup> This advice has equal application to House of Representatives committees.

<sup>101</sup> *House of Commons Committee of Privileges*,  
2nd Report, Session 1968-69, H.C. 308(1968-69).

### *Motions and divisions*

The standing orders are silent on the moving of motions and voting in committees except to state that the chairman has a casting vote only<sup>102</sup> and that motions and the details of divisions are to be recorded<sup>103</sup> (*see also* procedures for consideration of draft reports, p. 611).

Following the procedure of the committee of the whole, motions and amendments do not require a seconder.<sup>104</sup> The one exception is the nomination of a member for election as chairman (*see* p. 594).

Questions are determined on division by a majority of votes. While the chairman of a House of Representatives committee exercises a casting vote only<sup>105</sup>, the voting rights of chairmen of joint committees vary:

- Joint Standing Committee on Electoral Matters—deliberative vote (Senate S.O. 298) and a casting vote (in accordance with resolution of appointment);
- Joint Committee on Foreign Affairs, Defence and Trade—deliberative vote only (Senate S.O. 298);
- Joint Standing Committee on the New Parliament House—
  - in matters of procedure, each of the joint chairmen, whether or not occupying the chair, had a deliberative vote and, in the event of an equality of voting, the chairman occupying the chair had a casting vote, and
  - in matters other than those of procedure, each of the chairmen, whether or not occupying the chair, had a deliberative vote only (in accordance with the resolution of appointment).

As in the committee of the whole, a division is not proceeded with unless more than one member had called for a division. In such instances the member may *inform the chairman that the member wishes the member's dissent to be recorded in the minutes*. This request is automatically granted.<sup>106</sup>

### *Minutes of proceedings*

The minutes of a committee record the names of members attending each meeting, every motion or amendment moved in the committee and the name of the mover. The chairman must record the names of members voting in a division, indicating on which side of the question they respectively vote.<sup>107</sup> In practice this is recorded in the minutes by the secretary. The minutes also record the time, date and place of each meeting, the attendance of specialist advisers, the names of any witnesses examined, the documents formally received and any action taken in relation to them, and the time, date and place of the next proposed meeting.

As far as possible the style of committee minutes conforms to the style of the Votes and Proceedings of the House. They do not summarise deliberations but record matters of fact and any resolutions resulting from the committee's deliberations.

The chairman confirms the minutes of a preceding meeting by signing them. The committee secretary may certify as correct the unconfirmed minutes of a final meeting of a committee.

102 S.O. 331.

103 S.O. 332.

104 S.O. 279.

105 For an exception *see* Select Committee on Aircraft Noise where the chairman had a deliberative vote and, in the event of an equality of

votes, also had a casting vote, VP 1969-70/15-17.

106 S.O.s 193, 277.

107 S.O. 332.

Minutes are required to be tabled in the House with the relevant report.<sup>108</sup> If a committee is conducting more than one inquiry, extracts from its minutes relating only to the inquiry on which it is reporting should be tabled. When endeavouring to ascertain whether certain evidence tendered to the House of Representatives Standing Committee on Expenditure in 1984 had been authorised for publication, it was found that the minutes presented to the House on the subject were those of the subcommittee that had conducted the inquiry. The document in question had not been authorised for publication by the subcommittee, but by the full committee. As the minutes of the full committee relating to the particular inquiry had not been presented to the House the situation was remedied by the Deputy Speaker presenting those minutes of the full committee to the House.<sup>109</sup>

A corrected transcript of the published evidence taken by the committee should also be tabled. This procedure applies to interim and unfinished inquiry reports as well as final reports. If the minutes show disagreement or divisions on the content of a report, there are advantages in having them printed as an appendix to the committee's report. Publication of minutes is one method of drawing attention to dissent, and may overcome the need for a separate dissenting report. Reports by the Committee of Privileges and the report by the Select Committee on Pharmaceutical Benefits exemplify this approach.<sup>110</sup>

Minutes, like all papers and documents presented to the House, are considered public once they are tabled. If not ordered to be printed, they may be inspected at the offices of the House at any time by Members and, with the permission of the Speaker, by other persons, and copies or extracts may be made.<sup>111</sup> Transcripts of evidence tabled with the minutes are subject to the same provisions. Therefore, a committee should not table evidence which it does not want to be made public.

### **Confidentiality of proceedings and records**

The confidentiality made possible by a committee's power to meet in private is bolstered by the provision in the standing orders that no member of the committee nor any other person, unless authorised by the House, may disclose or publish proceedings of the committee.<sup>112</sup> This provision covers private committee deliberations, the minutes which record them and committee files. Any unauthorised breach of this confidentiality may be dealt with by the House as a breach of privilege or a contempt.<sup>113</sup>

The files and other records of a committee are confidential to it and may be made available to others only by order of the committee, or of the House itself or, in the limited circumstances defined below, by authority of the Speaker. Sessional orders adopted in the 35th Parliament provided that each committee or any subcommittee shall have power to consider and make use of the evidence and records of the relevant standing committees appointed during previous Parliaments.

In 1980, the House passed a resolution delegating to the Speaker some of its authority in relation to the release of committee records. This resolution was amended in 1984 so that the Speaker may permit any person to examine and copy evidence submitted to, or documents of, committees, which are in the custody of the House, which have not already been published by the House or its committees and which have been in the custody of the House for at least 10 years. However if such evidence or documents were taken in camera or submitted on a confidential or restricted basis, disclosure shall not take place unless the evidence or documents

108 S.O. 347.

109 VP 1987-89/320.

110 'Pharmaceutical Benefits', *Report from the Select Committee*, PP 73(1972).

111 S.O. 320. See Ch. on 'Papers and documents'.

112 S.O. 340 and see also the *Parliamentary Privileges Act 1987*, s. 13. Sessional order 28B and resolutions of appointment authorise committees to publish any evidence given before them and any document presented to them.

113 *May*, pp. 704-5 (subject to the provisions of the *Parliamentary Privileges Act 1987*—and see Ch. on 'Parliamentary privilege').



have been in the custody of the House for at least 30 years, and, in the opinion of the Speaker, it is appropriate that such evidence or documents be disclosed. The Speaker must report to the House the nature of any evidence or documents made available under the resolution and the persons to whom they have been made available. Subject to the same conditions, the Speaker and the President of the Senate have been authorised to release records of joint committees. Any such release must be reported to both Houses.<sup>114</sup>

This procedure applies to papers which have not been made public.

## Subcommittees

A committee cannot delegate any of its powers or functions to a subcommittee unless so authorised by the House. Without this authority committees may only appoint subcommittees for purposes which do not constitute a delegation of authority, such as the drafting of reports.<sup>115</sup>

Sessional orders and resolutions of appointment authorise committees to appoint subcommittees. Usually the committee is empowered to appoint subcommittees consisting of three or more of its members and to refer to any subcommittee any matter which the committee is empowered to examine. Even with this authorisation a committee cannot confer any powers which it has not been expressly empowered to confer. A committee may make orders regulating the transaction of business by its subcommittees.<sup>116</sup>

Section 3 of the *Parliamentary Privileges Act 1987* provides that, in the Act, a reference to a 'committee' includes subcommittees.

In appointing committees it is now usual to provide that they have the power to establish subcommittees which, like a committee, shall have the power to send for persons, papers and records; the power to move from place to place; the power to authorise publication of any evidence given before it and any document presented to it; and the power to consider and make use of the evidence and records of relevant standing committees appointed during previous Parliaments.<sup>117</sup> In addition the resolutions or sessional or standing orders provide for the appointment of a subcommittee chairman; the quorum (usually a majority of the members of that subcommittee); the participation of members of the committee who are not members of a subcommittee; and where and when subcommittees might sit.

Subcommittees are often appointed to:

- undertake ad hoc tasks such as taking evidence or conducting inspections on a particular day;
- investigate and report on a specified aspect of a broader inquiry, or
- conduct a full scale inquiry.

A subcommittee is required to keep minutes of each meeting and submit them with its report to the committee by which it was appointed. A subcommittee may not report directly to the House but only to its parent committee<sup>118</sup> which in turn reports to the House in terms of its reference.

In 1975, the Joint Committee on the Parliamentary Committee System appointed a subcommittee to travel overseas in connection with its inquiry. The subcommittee submitted to the committee a report which drew together the evidence which was taken by the full committee in Australia and information obtained by the subcommittee in its discussions and observations overseas. On the subcommittee's recom-

114 VP 1978-80/1539-40; 1983-84/849-50, 988-9; J 1978-80/1381.

115 May, p. 705.

116 May, p. 707.

117 Sessional order 28B.

118 May, p. 707.

mendation the committee tabled this lengthy report, in effect as an appendix to the committee's two-page report. The committee did not express any view on the subcommittee's conclusions and recommendations. The purpose of the arrangement was to seek comment on the report for the consideration of the full committee.<sup>119</sup> A member of the committee presented a dissenting report in which he stated:

It is my opinion, and I suspect that it is the opinion shared by many members of the Committee, that when a subcommittee is sent to perform a task it should not be obliged to report as an isolated unit; rather it should present its findings to its parent body, have them ratified and then present them to the Parliament.<sup>120</sup>

The same Member strongly opposed the tabling by committees of reports which amounted only to discussion papers and concluded that the committee had 'abrogated its responsibilities'.<sup>121</sup>

At the dissolution of both Houses on 11 November 1975 the Standing Committee on Road Safety was about to consider its report on passenger motor vehicle safety following an inquiry conducted over the previous 18 months. On the reappointment of the committee in the new Parliament the committee took the view that it had a duty to report to the House without further delay in order that recommendations and conclusions might be known and put into effect. The committee therefore appointed a subcommittee, consisting of three committee members who were members of the previous committee, to consider the draft report. The subcommittee's report was adopted by the new committee but in doing so it pointed out that the report did not necessarily convey specific views of committee members not being members of the subcommittee.<sup>122</sup>

At the conclusion of the 34th Parliament, the Standing Committee on Expenditure had a number of unfinished inquiries. Members returned in the ensuing general election who had been members of the Expenditure Committee and who were appointed to general purpose standing committees were keen to complete the work commenced in the 34th Parliament. Two references were made to general purpose standing committees; one on infrastructure to the Standing Committee on Transport, Communications and Infrastructure, and a second on the iron and steel industry to the Standing Committee on Finance and Public Administration. In a foreword to a report of the Standing Committee on Transport, Communications and Infrastructure on infrastructure, the chairman stated that in adopting the report of the subcommittee of members involved in the inquiry previously the committee was following a practice common to parliamentary committees that appointed subcommittees. The chairman then emphasised that the report did not necessarily contain or reflect the views of committee members who were not members of the subcommittee. The chairman went on to comment that the report did not necessarily reflect the views of the earlier Expenditure Committee and that the approach taken was supported by the precedent of the 1976 report on passenger motor vehicle safety from the then House of Representatives Standing Committee on Road Safety. The Standing Committee on Finance and Public Administration decided to finalise a report on the topic referred to it as soon as possible and resolved not to take further evidence and not to have further hearings or to recall witnesses who had spent considerable time in preparing their submissions and attending hearings. The committee thought that it would be of more value to update the report prepared by the House of Representatives Standing Committee on Expenditure and to table it while it was still relevant.

In general practice reports by subcommittees are prepared and considered in the same manner as committee reports. The chairman of the subcommittee presents the

119 PP 275(1975)xi.

120 PP 275(1975)95.

121 PP 275(1975)96-7.

122 'Passenger motor vehicle safety', *House of Representatives Standing Committee on Road Safety*, PP 156(1976)xii.

report and minutes of the subcommittee to the full committee. If the report is for tabling in the House, the committee then considers the report, makes any amendments it requires and resolves that the report, as amended, be the report of the committee.

There is no provision in the standing orders or resolutions of appointment for protest or dissent to be added to a subcommittee report. Committee practice is that formal protest or dissent is moved and recorded only at the committee consideration stage. A member of a subcommittee, or any other committee member, can disagree to a subcommittee report or portions of it when the committee is considering the matter and this will be recorded in the committee's minutes of proceedings.

## **Conferences with committees of the Senate**

The Committee of Privileges and committees appointed by resolution of the House have traditionally had no power to confer with committees of the Senate without leave of the House.<sup>123</sup> Senate standing orders contain similar provisions.<sup>124</sup> There is no instance of leave of the House being given for this purpose.

General purpose standing committees are empowered "to confer with a similar committee of the Senate".<sup>125</sup>

With the failure to appoint a Joint Committee on the Australian Capital Territory in the 35th Parliament the House resolved, to refer all proposed variations of the plan of lay-out of the city of Canberra and its environs to the Standing Committees of each House on Infrastructure (later renamed Transport, Communications and Infrastructure). The Senate concurred and also resolved that:

- the two committees meeting as a joint committee should either appoint the chairman of the Senate committee or the chairman of the House of Representatives committee as its chairman;
- the quorum of the joint committee be two Senators and two Members of the House of Representatives;
- a subcommittee of the Senate committee be empowered to sit with a subcommittee of the House of Representatives committee, as a subcommittee of the joint committee, when considering the variations, and
- a Senator, who was not a member of the Senate committee be permitted to attend meetings of the joint committee or a subcommittee and participate in the proceedings and deliberations, but not vote.

The House of Representatives agreed to the Senate's resolution and also empowered the joint committee to consider and make use of the evidence and records of the Joint Committees on the Australian Capital Territory appointed during previous Parliaments.

If leave of the House is granted for a House committee to confer with a Senate committee, there is provision in the standing orders for:

- a message to be sent to the Senate requesting it to concur in the proposal;
- the committee to confer freely by word of mouth with the Senate committee, and
- the committee to report in writing to the House the proceedings of the conference.<sup>126</sup>

<sup>123</sup> S.O.s 350, 26.

<sup>124</sup> Senate S.O.s 319-22.

<sup>125</sup> Sessional order 28B (r).

<sup>126</sup> S.O.s 351, 352, 353.

## Reports

### *Frequency of reporting*

The frequency with which a committee may report is determined by standing or sessional orders or its resolution of appointment. Standing committees are authorised to report from time to time, that is, as the need arises. Various select committees have had different limits placed on their power to report but they are usually required to report by a specified date or as soon as possible in which case they may submit only one report, whereupon they cease to exist.

A committee without the power to report from time to time may, however, seek leave of the House to submit an 'interim' or 'special' report.<sup>127</sup> A special report is one in which a committee draws attention to matters incidental to its inquiry and which relates to its powers, functions or proceedings. For example, in 1955, the Committee of Privileges submitted a special report seeking an extension of its reference<sup>128</sup> and, in 1976, the Joint Committee on the Parliamentary Committee System presented a special report seeking an amendment to its powers to elect a chairman and deputy chairman.<sup>129</sup> In 1987 and again in 1988 the Joint Committee of Public Accounts felt compelled to report on the issue of whether it was able to sit while the Senate was sitting, the committee maintaining that it had a statutory right to meet contrary to the provisions of Senate standing orders and the wish of the Senate.<sup>130</sup> In 1988 the Joint Committee of Public Accounts also reported on revised procedures for its reports.<sup>131</sup>

Instead of presenting a single report on a wide-ranging inquiry, a committee, properly authorised, may submit one or more interim reports. Such reports may deal with the committee's method of inquiry, with progress on the inquiry as a whole or contain the committee's recommendations on facets of the inquiry or both.<sup>132</sup>

From time to time committees have reported to the House without a formal inquiry reference or without following the normal procedures of advertising, inviting submissions and public hearings. Circumstances in which committees have decided to report without following the normal inquiry processes have included situations:

- when a need to report quickly had been identified;
- where a committee wished to comment on aspects of the Government's response to previous reports;
- where the issues were felt to have little public interest;
- where costs and other resource limitations had prevented a full inquiry;
- where extensive published material, letters and other documents were available, and
- where a report naturally flowed from informal briefings or inspections.

This procedure provides a cost and time effective way for a committee's views to be placed before the Parliament, but should be used with care, as the committee

127 S.O. 341. The standing order also provides that, by leave, the committee may table the report with or without the evidence, or the evidence only.

128 VP 1954-55/225-6,239.

129 VP 1976-77/119.

130 Reports 264 and 292 of the Joint Committee of Public Accounts PP 75(1987) and PP 317 (1988); Senate S.O. 300. See also Reports of the Senate Standing Orders Committee,

PP 117 (1983) and PP 169 (1987); and J 1987-89/1050.

131 Report 291 of the Joint Committee of Public Accounts PP 146 (1988).

132 'Effectiveness of support services for Aboriginal and Torres Strait Island communities, *House of Representatives Standing Committee on Aboriginal Affairs, Interim report*, PP 197 (1988).

could leave itself open to criticism that some community, government and other interest groups have been excluded from the decision-making processes. In addition the committee runs the risk that its conclusions and recommendations could be based on incomplete or incorrect information.

Committees have also presented annual reports.<sup>133</sup> The annual report of the Department of the House of Representatives also contains information on committees serviced by the department.

### *Drafting and consideration of reports*

It is the duty of the chairman of a committee to prepare a draft report.<sup>134</sup> In this task it is usual practice to call on the assistance of the committee secretariat.

If, at the meeting at which the chairman formally brings up the chairman's draft report for the committee's consideration, any other member submits a draft report, the committee must first decide upon which report it will proceed.<sup>135</sup>

The procedures for the consideration of a draft report are set down in standing order 343:

The chairman shall read to the committee, at a meeting convened for the purpose, the whole of his draft report, which may at once be considered, but, if desired by any Member it shall be printed and circulated amongst the committee and a subsequent day fixed for its consideration. In considering the report, the chairman shall read it paragraph by paragraph, proposing the question to the committee at the end of each paragraph "That it do stand part of the report". A Member objecting to any portion of the report shall move his amendment at the time the paragraph he wishes to amend is under consideration. A protest or dissent may be added to the report.

In practice the report is not read to the committee but circulated in advance. The committee may consider groups of paragraphs together, by leave.

Amendments may be proposed by any member and are determined in the same way as amendments to a bill in committee of the whole. The committee may divide on any question. After the draft report has been considered, all or part of it may be reconsidered and amended.<sup>136</sup>

When all paragraphs and appendixes have been agreed to, with or without amendment, the question is proposed "That the draft report (as amended) be the report of the committee". The date on which the report is adopted is the date which appears under the chairman's signature in the report.

The procedures for the drafting, consideration, adoption, tabling and correction of inquiry reports apply equally to all committee reports, including special and interim reports.

### *Protest or dissent*

Since 1978, the standing orders have permitted committee members to add a protest or dissent to the committee's report.<sup>137</sup> The difference, if any, between a 'protest' and a 'dissent' is not strictly defined. However in dissenting from a report by the Standing Committee on Environment and Conservation in August 1984<sup>138</sup>, three members of the committee, while not disagreeing with some of the report recommendations, stated that they had serious reservations about reporting without conducting a thorough investigation. They also considered it premature to report at that particular time. This action appeared to be more of a protest at the way in

133 VP 1987-89/435-6, 987.

134 S.O. 342.

135 S.O. 344.

136 S.O. 345.

137 S.O. 343. Standing order amended on 22 February 1978, VP 1978-80/19-20.

138 'Protection of the Greater Daintree', *House of Representatives Standing Committee on Environment and Conservation*, PP 199(1984) 21-2.

which the committee had gone about reporting on the reference. A possible distinction between protest and dissent would be to associate a protest with procedural matters, and dissent being against conclusions or recommendations of a committee.

A member who proposes to present a protest or dissent is not required to seek authorisation from the committee, as this power resides with individual members, not with the committee. Accordingly, the protest or dissent need not be shown to the chairman or other members of the committee, but not to do so would be regarded as a discourtesy.

A protest or dissent must be relevant to the committee's reference, as the authority delegated to the committee and its members is limited to those areas defined by the terms of the inquiry. The words 'protest' and 'dissent' imply some relationship with the committee's report. A protest (which is a rarely used form) or dissent is usually appended to the committee's report, and it may be signed by more than one member.<sup>139</sup>

In its 1989 report on procedures for dealing with witnesses, the Standing Committee on Procedure argued that in camera evidence should not be disclosed by Members in dissenting reports, unless authorised by the committee. It proposed the inclusion of a provision to enforce this prohibition in resolutions to be adopted by the House to guide committees in dealings with witnesses.<sup>140</sup>

Alternative methods of recording dissent are:

- submitting an alternative draft report to the committee<sup>141</sup>;
- moving amendments to the draft report, the voting on which is recorded in the minutes which are subsequently tabled and thereby become public<sup>142</sup>;
- making a statement in the House, by leave, when the report is tabled, or
- stating the dissent or protest in debate on any motion moved in relation to the report.

In 1975, a member of the Joint Committee on Foreign Affairs and Defence was given leave to make a statement following the tabling of a report by the committee. The member stated that he had been overseas when the final draft and the dissenting report were prepared and completed. The member had not been able to read the report or the dissenting report before their publication and concluded:

I find that I dissent from both the report and the dissenting report but my dissent is moderate.

The member did not elaborate on the dissent.<sup>143</sup> In 1980, a Member who similarly was unable to participate in the consideration of a report by the Standing Committee on Road Safety indicated, when the report was tabled, that he disagreed with two of its recommendations and gave reasons.<sup>144</sup> In the 34th Parliament, in the report of the Joint Select Committee on an Australia Card, the chairman with two government members dissented from the report of a majority of the committee (one government and four opposition members) and proposed some alternative recommendations on principal issues of the inquiry.<sup>145</sup>

139 PP 264(1977)71-2. In this instance one member added, separately, a protest and a dissent.

140 VP 1987-89/1121.

141 S.O. 344.

142 S.O.s 347, 320. Members of the Select Committee on Pharmaceutical Benefits had no power to add a protest or dissent to the

committee's report. Their dissent was shown in the minutes which were printed as part of the report, PP 73(1972)95-147.

143 H.R. Deb. (27.5.75)2841.

144 H.R. Deb. (11.9.80)1188-9.

145 *Report of the Joint Select Committee on an Australia Card*, PP 175 (1986) 214-59.

On 22 May 1980 the Standing Committee on Environment and Conservation resolved to use the appropriate procedures of the House to enable a motion to be moved permitting the committee to lodge its report with the Speaker or Chairman of Committees during a long adjournment following that day of sitting. One member of the committee objected to this procedure and rejected leave in the House when an attempt was made by the chairman to move the appropriate motion. Although six other members of the committee (of a total of eight) had voted in favour of this action, the chairman decided not to pursue the suspension of standing orders to enable the committee's wishes to be met, and it was left to an opposition member of the committee to move the suspension. The member did so later that day and the matter was decided in the House on party lines.<sup>146</sup>

In extreme circumstances members may record their dissent by resigning from the committee. In such instances members have no automatic right to explain their resignation in the House but could do so in a statement made by leave.

If a committee is unable to agree upon a report, it may present a special report to that effect, with its minutes and the transcript of evidence. *May* states that the committee may simply table the minutes and evidence without any observations<sup>147</sup>, but this action would seem undesirable even if the circumstances of the committee's inability to agree were widely known. The committee should still report the circumstances to the House if only as a matter of form and to place them on record.

### *Presentation of reports*

Committee reports may be presented at any time when other business is not before the House.<sup>148</sup> However, commencing in 1988, the House allocated a period each sitting Thursday for the presentation of parliamentary committee and delegation reports.<sup>149</sup> A copy of the report, signed by the chairman, and the committee's minutes of proceedings are tabled in the House by the chairman or a member of the committee.<sup>150</sup> A corrected copy of the transcript of evidence, other than confidential evidence, should also be tabled. Joint committee reports are tabled in both Houses, usually on the same day. Occasionally reports are tabled in one House well before being tabled in the other, especially when the Houses follow different sitting patterns.

It is normal practice for the Member who presents a report to move that the report, with or without the accompanying documents, be printed.<sup>151</sup> Sessional orders operating in the 35th Parliament provided that if a committee member presented a report from a committee on a sitting Thursday morning then, subject to any determination of the Selection Committee, the member and one other member of the committee could each be accorded priority in making a statement to the House for a period not exceeding 10 minutes. The sessional orders further provided that after the statements a specific motion in connection with the committee report could be moved without notice by the member presenting the report and the debate on the question then adjourned until a future day to be determined by the Selection Committee.<sup>152</sup> A committee member presenting a report at other times may also be granted leave to make a brief statement on the report and this may be followed by statements, by leave, from other Members. At this time if a Minister wishes to move a motion that the House take note of the report, or if a Minister or Member

146 VP 1978-80/1530, 1531.

147 *May*, p. 713.

148 S.O. 102.

149 Sessional order 102A.

150 S.O.s 346, 347 amended by sessional order 9.12.87, operative 15.3.88.

151 S.O. 348 amended by sessional order 9.12.87, operative 15.3.88.

152 Sessional order 102B.

wishes to move that the report be adopted or agreed to, leave is required. The reason for leave being required for the above actions is that the standing orders state that, upon the presentation of a report, no discussion of the subject matter may take place (however in the 35th Parliament this limitation was suspended by sessional order<sup>153</sup>). It is also provided that the consideration of the report may be set down for a subsequent sitting when a specific motion without notice in connection with it may be moved.<sup>154</sup>

Upon the presentation of a report, it may be read to the House by the Member presenting it.<sup>155</sup> In 1955, the House ordered that the Clerk read the special report of the Committee of Privileges relating to the *Bankstown Observer* case.<sup>156</sup>

#### *Amendment of tabled reports*

Minor amendments to tabled copies of committee reports may be made with the approval of the Clerk of the House. Amendments are initialled by the committee secretary. In cases of more substantial, even if still relatively technical, amendments the committee chairman, or even the whole committee, would have to approve them. In the case of amendments of substance a further report would have to be presented<sup>157</sup> or, in the case of a select committee, recommitment of the report, by the House to the committee, would have to be sought. Alternatively, the chairman could make a statement in the House.

#### *Premature disclosure or publication*

Standing order 340 provides that the evidence taken by any select committee of the House and documents presented to and proceedings and reports of such committee, which have not been reported to the House, shall not, unless authorised by the House, be disclosed or published by any member of such committee or by any other person. Contravention of this rule has been held to be a contempt.<sup>158</sup> This is a blanket prohibition which precludes disclosure of all or part of a report, or of its contents.

In 1979, the House resolved that, if the House was not sitting when the Standing Committee on Expenditure had completed its current inquiry, the committee was authorised to send the report to the Speaker, or, in the Speaker's absence, to the Chairman of Committees, who in turn was authorised to give directions for its printing and circulation.<sup>159</sup> The report was in fact processed in this way and was subsequently tabled in the House.<sup>160</sup>

According to a 1983 opinion of the Attorney-General there was nothing to prevent the House authorising a committee, when it had completed an inquiry, to send its report to the Speaker (or in the Speaker's absence to the Chairman of Committees) who was authorised to give directions for its printing and circulation; but such publication was not protected by the *Parliamentary Papers Act 1908* nor was privilege at common law conferred upon the publishers of the report (other than for Members' use) in respect of proceedings for defamation arising out of the publication.

On 27 November 1986 the House resolved that the Joint Select Committee on Electoral Reform, if it completed its inquiry into the operation during the 1984

153 S.O. 348 amended by sessional order 9.12.87, operative 15.3.88.

154 S.O. 348 amended by sessional order 9.12.87, operative 15.3.88.

155 S.O. 347.

156 VP 1954-55/225.

157 VP 1980-83/1220.

158 *Parliamentary Privileges Act 1987*, s. 13, deals with in camera evidence. See Ch. on 'Parliamentary privilege'.

159 VP 1978-80/1205.

160 VP 1978-80/1254.



general election of certain amendments to Commonwealth electoral legislation during a period when the House was not sitting, could send its report to the Speaker or, in the absence of the Speaker, to the Chairman of Committees, who was authorised to give directions for its printing and circulation.<sup>161</sup>

After a report from the Standing Committee on Expenditure on the Aboriginal Development Commission was debated, a Member raised, as a matter of privilege, the reported submission to legal counsel who had earlier been engaged to assist the committee of a final draft of the committee's report.<sup>162</sup> The following day the Speaker stated that he was not aware of any precedent for the situation but said he was prepared to accord precedence to a motion on the matter. The Member who had raised the complaint said that, in the circumstances, he would not move a motion and the matter was not pursued any further.<sup>163</sup>

In 1986 the House agreed to a motion moved by the Chairman of the Joint Select Committee on Telecommunications Interception to refer to the Committee of Privileges press reports relating to purported contents of the report of the committee which had not been presented to the House. The Committee of Privileges could make no recommendation on the matter of disclosure as it was unable to find the identity of the person or persons responsible. On the matter of publication, although the Committee of Privileges took note of the view of the chairman of the joint select committee to the effect that no impediment had been caused to that committee, it found that a contempt had been committed by those responsible for publishing the material. It left to the House the question of penalties, proposing that, if the House wished the issue of penalties to be considered, it refer the matter back to the committee.

An important qualification on disclosure is to be found in section 92N of the *Australian Security Intelligence Organization Act 1979*. The Joint Committee on the Australian Security Intelligence Organization is not permitted to present a report until the advice of the Minister has been obtained as to whether the disclosure of any part of the report would, or would be likely to, disclose the identity of a person employed by or an agent of the organization or classified material or information on the methods, sources, targets or results of the operations or procedures of the organization.

Committees have chosen, from time to time, to take no action on press articles partially disclosing the contents of their reports or commenting on committee deliberations during the drafting of reports. It has been thought counter-productive to give further publicity and credence to such articles.<sup>164</sup>

With the enactment of the *Parliamentary Privileges Act 1987*, complaints in this area, as in other areas, have to be tested against the provisions of section 4 of the Act which provides that conduct does not constitute an offence unless it amounts or is intended or likely to amount to an improper interference with the free exercise by a House or committee of its authority or functions or with the free performance by a Member of the Member's duties.

In 1977, the Clerk of the House advised the Standing Committee on Expenditure that he did not consider it a breach of the spirit or intention of the standing orders for the committee to supply to government departments, on a confidential basis, a document setting out its preliminary conclusions. He noted that the committee's

<sup>161</sup> VP 1985-87/1365.

<sup>162</sup> H.R. Deb. (22-23.5.85)2964.

<sup>163</sup> H.R. Deb. (23.5.85)3080-1.

<sup>164</sup> VP 1985-87/899; H.R. Deb. (1.5.86)2890—Statement by deputy chairman of the Joint Select Committee on an Australia Card, H.R. Deb. (20.10.86)2331-2—Personal explanation by a committee member regarding a newspaper report of the member's dissenting report (presented 25.11.86).

intention was to obtain a considered response from the departments in camera and stated that he considered this was part of the committee's investigative or questioning process.

On rare occasions a committee has been authorised, even directed, to depart from standing order 340 and disclose its report before its presentation to the House. The resolution of appointment of the Joint Committee on War Expenditure provided that:

The Committee have power, in cases where considerations of National Security preclude the publication of any recommendations and of the arguments on which they are based, or both, to address a memorandum to the Prime Minister for the consideration of the War Cabinet, but, on every occasion when the Committee exercises this power, the Committee shall report to the Parliament accordingly.<sup>165</sup>

In 1952, the Joint Committee on Foreign Affairs was directed, by its resolution of appointment, to forward its reports to the Minister for External Affairs. On every occasion when it did so, the committee was required to inform the Parliament that it had reported.<sup>166</sup> In later Parliaments the committee's resolution of appointment added that, in the case of inquiries not initiated by the Minister, the committee was not authorised to report either to the Minister or to the Parliament, without the Minister's consent. It was further provided that, if opposition Members were represented on the committee, copies of its reports to the Minister were to be forwarded to the Leader of the Opposition for his confidential information.<sup>167</sup> It was left to the Minister to decide whether or not the committee's reports would be published.<sup>168</sup> These arrangements were justified on the ground of national security.

### *Recommittal*

All or part of a report may be recommitted to a committee by the House, or it may be recommitted and the resolution of appointment amended. *May* states:

A recommittal generally takes place for some cause which sufficiently indicates to the committee what it is expected to do, and, hence, it is not usual for instructions to be given on recommittal; but the committee is to gather from the sense of the House in such proceedings what method it is to pursue. When a report is thus recommitted, the committee, with all its powers, is thereby revived.<sup>169</sup>

### *Government responses to reports*

In 1978, the Prime Minister announced that the Government would henceforth respond formally in the Parliament to recommendations contained in parliamentary committee reports. The Prime Minister stated that, within six months of the tabling of a report, the responsible Minister would make a statement in the Parliament outlining the action the Government proposed to take in relation to the report. If the six-month period expired during an adjournment or recess, the ministerial statement would be made at the earliest opportunity in the next sittings.<sup>170</sup> A similar procedure had been initiated earlier in relation to reports by the Standing Committee on Expenditure.<sup>171</sup> With a change in Government in 1983 there was also a

<sup>165</sup> VP 1940-43/157-8,161. In 1955, attempts were made to have one of the committee's reports and related documents published. The report concerned allegations of fraudulent practices during the years of World War II. The Prime Minister having first agreed to table the report later declined to do so on the grounds of justice to the individuals concerned, VP 1954-55/293-4,301; H.R. Deb. (6.9.55)360-75; H.R. Deb. (13.9.55)572-6.

<sup>166</sup> VP 1951-53/129.

<sup>167</sup> VP 1954-55/94-5.

<sup>168</sup> The Minister tabled the committee's first report on 11 September 1952; VP 1951-53/417.

<sup>169</sup> *May*, p. 719.

<sup>170</sup> H.R. Deb. (25.5.78)2465-6.

<sup>171</sup> H.R. Deb. (8.4.76)1499.

change to the method of response to parliamentary committee reports. In answer to a question without notice on 24 August 1983<sup>172</sup> the Leader of the Government in the Senate stated that irrespective of any undertaking given by the previous Government and the previous Prime Minister, the Government had decided that responses to parliamentary committee reports would be made on behalf of the Government by way of a ministerial statement in Parliament. The Minister also announced that the period in which responses were to be made would be reduced from six months to three months.

These procedures do not apply to reports by the Joint Committee of Public Accounts, the Parliamentary Standing Committee on Public Works or the Joint Committee on the New Parliament House. Responses are given to reports by the Joint Committee on Publications resulting from its broad inquiries but not to reports by other committees concerned with 'internal' matters, such as the House Committee. The Presiding Officers have also provided responses to reports by the Joint Committee on Publications.<sup>173</sup>

The Speaker has adopted the practice of presenting to the House at approximately six-monthly intervals a schedule listing government responses to House of Representatives and joint committee reports as well as responses outstanding.<sup>174</sup> Subsequently the Leader of the House tables a list of parliamentary committee reports showing the stage reached with the government response in each case.<sup>175</sup> This list does not constitute the formal response. As well the Department of the House of Representatives lists in its annual report all committee reports presented during a year and indicates whether any of these have been responded to by the Government.

## Effects of prorogation and dissolution

### *Prorogation*

For constitutional reasons committees of the House and joint committees appointed either by standing order or by resolution for the life of the Parliament, continue in existence but may not meet and transact business following prorogation.<sup>176</sup> Committees whose tenure is on a sessional basis cease to exist.

Committees appointed by standing or sessional order or by resolution of the House, or both Houses, for the life of the Parliament may meet again in the new session of the same Parliament. Inquiries commenced in the previous session are resumed without action by the House unless the subject of inquiry was referred to the committee by the House in the previous session. In such cases the effect of the reference by the House ceases and the subject must be again referred by resolution of the House.<sup>177</sup>

Select committees which are appointed on a sessional basis, that is, not for the life of a Parliament, cease to exist upon prorogation. If a select committee is to continue its activities in the new session, the committee and its membership must be re-appointed by resolution and its terms of reference renewed. If the committee wishes to use the minutes of evidence and records of the previous committee, it must be given that power by the House.<sup>178</sup>

172 S. Deb. (24.8.83) 141-2.

173 VP 1978-80/1237.

174 VP 1987-89/191.

175 VP 1987-89/255.

176 See Ch. on 'The parliamentary calendar' for more detail; and see *Odgers*, pp. 620-5.

177 Standing Committee on Aboriginal Affairs: Initial reference, VP 1976-77/512; re-re-

ferred, VP 1977/13; Committee of Privileges: Initial reference, VP 1973-74/619; re-referred, VP 1974/34.

178 See VP 1977/10-11,16, for the reappointment of the Select Committee on Tourism and VP 1977/12,16, for the reappointment of the Joint Select Committee on Aboriginal Land Rights in the Northern Territory.

The provisions of the Acts establishing each of the joint statutory committees determine that the committees are to be appointed at the commencement of each Parliament, and that their members may hold office until the House of Representatives expires by dissolution or effluxion of time. Provision is also made for these committees to meet and transact business notwithstanding any prorogation of the Parliament. The granting of these powers by means of legislation is an example of the Parliament (the Crown and the two Houses) exercising its authority to declare powers under section 49 of the Constitution.

### *Dissolution*

Upon dissolution of the House all committees, including joint committees, cease to exist. Even if a committee is appointed in the next Parliament with the same terms of reference, powers and title, it is in fact a different committee.

Consequently, the House must expressly authorise such a committee to have access to the records of, and evidence taken by, the previous committee. Without that authority no such access is permissible (*see* p. 647).

The effect of prorogation and dissolution on committees is discussed at greater length in the Chapter on 'The parliamentary calendar'.

### **Televising, filming and tape-recording of proceedings**

There is no provision under statute or the standing orders of the House of Representatives for the televising or filming of committee proceedings; nor is televising or filming expressly forbidden. However, it has been considered that a committee should not permit the televising or filming, with sound, of its hearings without the authority of the House or both Houses, as the case may be.<sup>179</sup> Because these matters are not covered by the Parliamentary Proceedings Broadcasting Act, the protection attaching to a television or film company may be found to be similar to that enjoyed by any person who, with the approval of the committee, published a report of its proceedings, that is, qualified privilege may apply. Members of a committee and witnesses appearing before it would have the usual protection from action in respect of statements made by them during the proceedings. The fact that the proceedings were telecast, or filmed, would not alter their legal position.<sup>180</sup>

It has become reasonably common for some footage to be taken, without sound, at committee meetings. This footage may be used as background to news reports and has usually been taken while committee members are in fact preparing for a meeting or sitting at the table during a meeting but not actually taking evidence or deliberating (*see* below). Committees may permit cameras to film both committee members and witnesses, and the impression may be given that the witnesses are being examined, although typically they may just be giving their names and so on for the record or, the taking of evidence having been suspended, they may be speaking informally with committee members. Most public hearings and inspections of the Joint Committee on the Australian Capital Territory were the subject of some filming without sound during the period 1980-87. Filming and sound recording of the taking of evidence were expressly not permitted. On most of these occasions the film was subsequently used in local telecasts. In April and June 1968, the Joint Committee of Public Accounts authorised the Australian Broadcasting Commission to film the taking of evidence. The committee was inquiring into the administration

179 Senate S.O. 36AA(21), adopted on 16 March 1977, provides that standing committees may authorise the televising of public hearings, at the discretion of each committee, and under such rules as the Senate may adopt. The Senate had

not adopted any such rules at the end of 1988; *see also* PP 168(1972)57. Precedents were established in the autumn sittings in 1989.

180 Advice of the Attorney-General to the President of the Senate, dated 23 May 1963.

of the Commission, and the film was subsequently used in the Commission's television news coverage. In 1974, the Standing Committee on Aboriginal Affairs permitted Film Australia to film formal proceedings, without sound, and informal proceedings (the conduct of inspections), with sound. It was agreed that the committee should have an opportunity to see the film before its release. In 1984 the committee permitted televising with sound of the commencement of a public hearing. Witnesses answered a formal question about their organisation, but once the hearing was formally under way only filming without sound was permitted. Other committees have permitted filming under similar conditions.

Important questions of principle arise in respect of televising and filming. These relate not only to the legal position of the parties involved but also, for example, to the rights and legitimate interests of witnesses and of third parties who may be the subject of comment in proceedings conducted under privilege. The atmosphere in which the televised proceedings are held might also affect a witness significantly in some cases, as experience of the televising of committee proceedings in the United States of America suggests. The House needs to consider carefully its position on these matters and then, if appropriate, authorise its committees to permit televising, filming and sound recording of their proceedings subject to such conditions as it may think fit to apply.

Mainly because of the potential distraction to members and witnesses, photographs of committee proceedings are not permitted without the committee's authority. Committees occasionally agree to pose for photographs before or after a hearing, during a normal suspension of their proceedings or, in special circumstances, they may briefly suspend their proceedings in order to permit photographs to be taken.

People taking film, or still photographs, should have regard to the powers of each House to deal with any act which may be held to be a contempt or a breach of the rules applying to the taking of photographs in Parliament House.

Any person permitted by a committee to attend a hearing may tape record the proceedings. It is the responsibility of the person concerned to ensure that the recording is not used improperly or in contravention of the Parliamentary Proceedings Broadcasting Act or any other statute. The laws of defamation, publication, and so on, apply. Further, such tape recording of proceedings has no standing in terms of the laws governing the broadcast of proceedings or the laws of parliamentary privilege.

## **Staff and advisers**

The Department of the House of Representatives provides a secretariat for committees of the House, and most joint committees, that have an investigatory role. The five standing committees concerned with 'internal' matters (excluding the Standing Orders Committee) appointed pursuant to standing orders and the two appointed pursuant to sessional orders, Procedure and Selection, are usually staffed on a part-time basis. Three of the joint statutory committees, Australian Security Intelligence Organization, Public Accounts and Public Works, also are staffed by the Department of the House of Representatives. One joint statutory committee was staffed by the Department of the Senate in 1989.

The standard full-time secretariat provided to each investigatory committee serviced by the Department of the House of Representatives comprises a committee secretary, a senior project officer, a project officer and two secretariat support staff. Allocation of additional staff depends on the availability of funds and personnel, each committee's terms of reference, the number of inquiries a committee is conducting, the nature of its operations, its reporting targets and the incidence of

subcommittee operations. The role of the secretariats is to service House and joint investigatory committees. They discharge this role by undertaking three basic functions:

- advising on committee procedure and practice;
- providing administrative and clerical support, and
- undertaking research/analytical work related to the terms of reference and content of particular inquiries.

Committees may be assisted by specialist advisers who are remunerated at agreed rates and receive reimbursement for travelling and incidental expenses. While witnesses are rarely paid a fee, this may be approved if a committee seeks from an expert witness important evidence which, because of the time and effort required for its preparation, the committee could not reasonably expect the witness to produce without remuneration. However, it is more likely that a committee will employ specialist advisers, and their function equates more closely to that of the committee secretariat than to that of witnesses. Between 1983 and 1987 the Speaker approved two positions of adviser on the secretariat of the Joint Committee on Foreign Affairs and Defence. These persons were to advise in the areas of foreign affairs and defence, respectively, and were employed on a contractual basis for the life of a Parliament. A similar arrangement applied in the secretariat of the Standing Committee on Expenditure where two advisers were employed on a contractual basis for the life of a Parliament. Most are engaged only for the duration of a particular inquiry or even to perform a specific task of limited scope and they normally work on a part-time basis, as required. While the standing orders provide, in effect, that the decision to employ and pay expert witnesses or advisers lies with the committee<sup>181</sup>, this is not so in practice. Proposals must be submitted to the Speaker who may approve them subject to the availability of funds. Many committees now employ expert advisers from time to time. Officers of the public service may be seconded to the Department of the House of Representatives on a full-time or part-time basis to provide specialist advice to committees and this form of support is frequently resorted to.

Special arrangements made in 1984 in connection with the Senate Select Committee on the conduct of a judge are worthy of note. A senior member of the Brisbane Bar and President of the Law Council of Australia, Mr C. W. Pincus, QC, was appointed as counsel to advise the committee. In September 1984 the Senate Select Committee on allegations concerning a judge was appointed, and the resolution of appointment provided that two Commissioners Assisting the Committee be appointed by resolution of the Senate. Each Commissioner was a recently retired Supreme Court judge, and they were permitted to be present at meetings of the committee and were able to participate in the committee's deliberations and examine witnesses before the committee. The committee also appointed counsel to assist it.<sup>182</sup>

#### COMMITTEES CONCERNED WITH THE OPERATIONS OF THE HOUSE

The following standing committees have traditionally been appointed at the commencement of each Parliament, pursuant to standing orders:

- Standing Orders Committee (not appointed in the 34th and 35th Parliaments);
- Committee of Privileges;
- Library Committee;

<sup>181</sup> S.O. 349.

<sup>182</sup> 'Report to the Senate', *Senate Select Committee on the conduct of a judge*, PP 168 (1984);

'Report to the Senate', *Senate Select Committee on allegations concerning a judge*, PP 279 (1984).

- House Committee;
- Publications Committee, and
- Committee of Members' Interests.<sup>183</sup>

The role of these committees largely relates to the operations of the Parliament but in the cases of the Committee of Privileges and the Publications Committee a broader, investigatory role is also involved.

### Appointment

It has not been the practice of the House to require a resolution for the appointment of these six standing committees. They commence to operate when Members are appointed to them and cease to exist only upon dissolution of the House. The number of members of each committee is determined by the standing orders. The members are nominated by the parliamentary parties and are appointed on a motion moved by a Minister, usually by leave.<sup>184</sup>

If a Member no longer wishes to serve on a committee, the Member informs the whip of that Member's party and the chairman of the committee in writing. A motion is then moved in the House by a Minister to discharge the Member from attendance on the committee. A replacement is also appointed by motion. Normally, both the discharge and the appointment are moved simultaneously on the one motion.<sup>185</sup> A Member may not simply resign; the Member must be discharged by a motion moved in the House.<sup>186</sup>

From time to time the number of members to serve on a committee may be increased. It is necessary to suspend standing orders to enable this to be done.<sup>187</sup>

### Powers and procedures

As the standing orders are largely silent on the powers and procedures of committees established pursuant to standing orders, it is established practice for them to operate in accordance with select committee procedures. Therefore, this section deals only with procedures and practices which differ from those of select committees.

### Quorum

The quorum of a standing committee is three, unless otherwise ordered.<sup>188</sup> The standing orders are silent on the quorum for meetings at which a committee of the House confers (sits jointly) with a similar committee of the Senate. In the absence of any provision, the Library, House and Publications Committees, when conferring, have fixed their quorums at five, provided that each House is represented in the quorum.

### Standing Orders Committee

The committee examines and reports on the operation of the standing orders and occasionally the practice of the House and recommends changes where necessary. The membership consists of the Speaker, the Chairman of Committees, the Leader of the House, the Deputy Leader of the Opposition, who are all *ex officio* members, and seven other Members.<sup>189</sup> The proportion of office holders in its

183 S.O.s 25-28A.

184 VP 1987-89/114-5.

185 VP 1987-89/472.

186 H.R. Deb. (5.9.05)1919.

187 VP 1962-63/39, VP 1954-55/202.

188 S.O.29. A quorum of five was fixed for the Committee of Privileges and the Standing Orders Committee in 1954, VP 1954-55/19,21.

189 S.O. 25.

membership has been a significant feature of the committee. Apart from the four ex officio members, other office holders have traditionally been appointed.<sup>190</sup>

The committee has power to confer with the Senate Standing Orders Committee<sup>191</sup> but it has rarely done so. Any such conferences have taken place when the matters under consideration have concerned the standing orders of both Houses. On 1 August 1901, the House resolved to grant the committee power to confer with the Senate Standing Orders Committee on the then proposed standing orders.<sup>192</sup> The Senate had already granted its committee a similar power.<sup>193</sup> The committees tabled separate reports. In 1905, the Houses again resolved to authorise their Standing Orders Committees to confer and on this occasion a joint report signed by both chairmen was tabled in each House.<sup>194</sup> The committee has no power under the standing orders to send for persons, papers and records.

When the House has appointed a Procedure Committee, as it did in the 34th and 35th Parliaments, it has suspended the standing order relating to the appointment of a Standing Orders Committee.<sup>195</sup>

### Library and House Committees

The Library Committee is concerned with the operation of the Parliamentary Library services while the House Committee is concerned with the provision of services and amenities to Members in Parliament House. Both committees consist of the Speaker and six other members.<sup>196</sup>

Both committees have an advisory role only. Executive responsibility lies with the Speaker and the President, who are not bound by the decisions of the committees. The limited powers of members of the House Committee, particularly concerning the appointment of officers of the Joint House Department, was raised as a matter of privilege in the House in 1927.<sup>197</sup> The Speaker made a statement in which he drew attention to the statutory responsibilities of the Speaker and the President under the Public Service Act.<sup>198</sup> A brief debate followed but no further action was taken.

Both the House and Library Committees regularly exercise their power to confer with similar committees of the Senate.<sup>199</sup> For many years the Speaker has been chairman of the Joint House Committee and the President has been chairman of the Joint Library Committee.

When the two House committees are sitting together as the Joint House Committee, they should, generally speaking, only consider those matters which affect joint services, as each House is master of its own affairs. Recommendations affecting only one House should properly be made by the appropriate House Committee independently. In 1956 and in 1959, the House of Representatives House Committee considered and reported informally on Members' accommodation. Reports are seldom made to the House.<sup>200</sup>

Neither the House Committee nor the Library Committee has the power to send for persons, papers and records.

190 Prime Minister Whitlam, VP 1973-74/31; Deputy Prime Minister Anthony, VP 1980-81/23.

191 S.O. 25.

192 VP 1901-02/116.

193 J 1901-02/87.

194 VP 1905/23,49; J 1905/28,39; 'Proceedings on lapsed bills', *Report of the Standing Orders Committees of the Senate and the House of Representatives*, S 2(1905) and H of R 2(1905).

195 VP 1987-89/85.

196 S.O. 27.

197 VP 1926-28/385.

198 H.R. Deb. (21.10.27)700.

199 S.O. 27.

200 *But see* report by Joint House Committee on accommodation for Members of Parliament at Canberra, VP 1926-28/181; *see also* reports by the Senate House Committee concerning Senators' dress in the Senate Chamber, PP 235(1971), and provision of staff and other facilities for Members of Parliament, PP 34(1972), and the Joint House Department. The Joint Library Committee reported regularly until 1926.



## Publications Committee

The Publications Committee of each House when conferring together form the Joint Committee on Publications which has the dual role:

- of recommending to the Houses from time to time as to what petitions and papers, which have not been ordered to be printed by either House, ought to be printed, and
- to inquire into and report on the printing, publication and distribution of parliamentary and government publications, and on such matters as are referred to it by the relevant Minister.<sup>201</sup>

The committee is discussed in detail in the chapter on 'Papers and documents'.

## Committee of Privileges

The Committee of Privileges consisting of 11 members is established to inquire into and report upon complaints of breach of privilege which may be referred to it by the House.<sup>202</sup> The committee has no power to initiate inquiries but the House may refer to the committee matters of a general nature, for example, a reference in 1979 on the use of House records in the courts.<sup>203</sup>

In practice, once the Speaker is satisfied that a *prima facie* case of breach of privilege or contempt has been made out, and that the matter has been raised at the earliest opportunity, precedence will be given to the Member who drew attention to the alleged breach of privilege or contempt to move a motion, usually that the matter of the complaint be referred to the Committee of Privileges. If the House is not sitting and is not expected to meet for a further period of at least two weeks, a Member may bring to the attention of the Speaker a matter of privilege which has arisen since the House last met and which the Member proposes should be referred to the Committee of Privileges. If the Speaker is satisfied that a *prima facie* case of breach of privilege has been made out and the matter is one upon which urgent action should be taken, the Speaker shall refer it to the Committee of Privileges, provided that any such referral must be reported to the House at the next sitting, whereupon the Member who raised the matter must move forthwith that the referral be endorsed by the House and, if this motion is negatived, the committee may take no further action on the matter.<sup>204</sup> The procedure for raising and dealing with questions of privilege and details of the functions and procedures of the committee are discussed in detail in the chapter on 'Parliamentary privilege'.

## Committee of Members' Interests

In 1984 the House inserted in the standing orders provision for a Committee of Members' Interests. The committee consists of seven Members and is established:

- (i) to inquire into and report upon the arrangements made for the compilation, maintenance and accessibility of a Register of Members' Interests;
- (ii) to consider any proposals made by Members and others as to the form and content of the register;
- (iii) to consider any specific complaints made in relation to the registering or declaring of interests;
- (iv) to consider what changes to any code of conduct adopted by the House are necessary or desirable;
- (v) to consider what classes of persons (if any) other than Members ought to be required to register and declare their interests; and
- (vi) to make recommendations upon these and any other matters which are relevant.<sup>205</sup>

201 S.O. 28.

202 S.O. 26.

203 VP 1978-80/975.

204 S.O. 97A.

205 S.O. 28A.

Requirements for the registration and declaration of Members' interests were adopted by the House on 9 October 1984 and were amended in 1986 and 1988. Upon election Members are required to complete a pro-forma statement of registrable interests in accordance with the requirements. The completed forms go to make up the Register which is presented to the House as soon as practicable. The committee also presents notifications of alterations of interests by members. It presents a report on its operations each year. The committee has the power to send for persons, papers and records but is limited in using that power unless it is approved by not less than four members of the committee other than the chairman, a requirement which also applies in respect of any investigation of the private interests of any person. The committee also has power to report from time to time and to confer with a similar committee of the Senate (if appointed).

In the 35th Parliament two committees concerned with the operations of the House were appointed by sessional order:

### **Procedure Committee**

The Standing Committee on Procedure is appointed "to inquire into and report on the practices and procedures of the House generally with a view to making recommendations for their improvement or change and for the development of new procedures".<sup>206</sup> As a result of reports of the Procedure Committee in the 34th Parliament a number of initiatives were taken relating to the business of the House in the 35th Parliament. One of the most significant developments in the procedures adopted by the House was the introduction of new procedures relating to private members' business and the associated establishment of the Selection Committee (*see below*).

The committee has power to send for persons, papers and records, to report from time to time, and it or its subcommittees have the power to consider and make use of the evidence and records of the Standing Committee on Procedure appointed during previous Parliaments.

### **Selection Committee**

This committee was first established by sessional order 28D which was adopted by the House on 9 December 1987. The committee consists of 11 members, six government and five opposition, and its basic responsibility is "to arrange the timetable and order of business prior to 12.30 p.m. on each sitting Thursday" pursuant to the routine of business provided in sessional order 101. The quorum of the committee is five, including three government members.

The committee was set up as part of a package of new procedures for considering private Members' business and parliamentary committee and delegation reports. Under the sessional orders which were effective from 15 March 1988, the House set aside the period from 10 a.m. to 2 p.m. every sitting Thursday for the presentation and consideration of parliamentary delegation and committee reports, private Members' business and other opportunities for private Members to raise issues on their own account, namely, grievance debate and Members' 90 second statements. As part of its charter the committee selects, establishes the order of, and allots the time to, the private Members' motions and bills to be considered during private Members' business. The committee meets each sitting week to determine the program of business for the following sitting Thursday. On Thursday of each week it reports these decisions to the House. These are printed in Hansard

<sup>206</sup> Sessional order 28C (a).

and published in the Notice Paper of the first sitting day of the following week. The committee has no power under the sessional order to send for persons, papers and records nor has it the power to appoint subcommittees or conduct inquiries as such.

### **GENERAL PURPOSE STANDING COMMITTEES**

On 24 September 1987, for the first time since Federation, the House established a comprehensive committee system by setting up eight general purpose standing committees.<sup>207</sup> At the same time, the functions of the Joint Committee on Foreign Affairs and Defence were extended, thus giving the House the capacity to monitor or to "shadow" the work of all federal government departments and instrumentalities.

These standing committees are so called because they have been established (or stand) for the duration of the Parliament and have the power to inquire into and report to the House on any matter referred, including any pre-legislation proposal, bill, motion, petition, vote or expenditure, other financial matter, report or paper. The general purpose standing committees appointed in the 35th Parliament were as follows:

- Standing Committee on Aboriginal Affairs;
- Standing Committee on Community Affairs;
- Standing Committee on Employment, Education and Training;
- Standing Committee on Environment, Recreation and the Arts;
- Standing Committee on Finance and Public Administration;
- Standing Committee on Industry, Science and Technology;
- Standing Committee on Legal and Constitutional Affairs, and
- Standing Committee on Transport, Communications and Infrastructure.

### **Appointment**

Members are appointed in numbers which reflect the proportion of government to opposition Members in the House. For a general purpose standing committee of 10 Members there are six government and four opposition Members; for a committee of 12, there are seven government and five opposition Members; and each committee may be supplemented with up to three Members for a particular inquiry.<sup>208</sup> Members are nominated by the appropriate party Whip and are considered to be appointed to a committee once the notification of a nomination has been received by the Speaker. The Speaker would normally announce to the House any nomination at the first available opportunity after receipt of the Whip's letter.

### **Powers and procedures**

The sessional order establishing general purpose standing committees specifies that the committees can only inquire into matters referred to them by either the House or a Minister. The sessional orders are generally silent on the method of operation of the committees, and hence they follow the established practice of operating in accordance with select committee procedures.

Each committee must elect a government member as its chairman and a deputy chairman is appointed for each committee; as a general rule the deputy chairman is an opposition Member. The committees or their subcommittees have power to

<sup>207</sup> Sessional order 28B.

<sup>208</sup> Sessional order 28B, VP 1987-89/233.

send for persons, papers and records and to move from place to place. While the standing orders relating to select committees permit each committee to adjourn from time to time and to sit during any sittings or adjournment of the House, the sessional order provides subcommittees with similar powers. Each committee or any subcommittee is also empowered to authorise publication of any evidence given before it and any document presented to it, and each committee has leave to report from time to time.

In addition each committee or any subcommittee has been given the power to consider and make use of the evidence and records of the relevant standing committees appointed during previous Parliaments and each committee may confer with a similar committee of the Senate. Where these powers have been used they are referred to elsewhere in this chapter.

### **Quorum**

The sessional orders have special quorum requirements. For a standing committee of 12-15 members, six members of the committee constitute a quorum of the committee including four government members, and for a committee of 10 or 11 members, five members of the committee constitute a quorum of the committee including three government members. The quorum of a subcommittee is the majority of members of that subcommittee.<sup>209</sup>

## **JOINT COMMITTEES ESTABLISHED BY RESOLUTION OF BOTH HOUSES**

### **A creature of both Houses**

Joint standing and select committees are established by resolutions agreed to by both Houses and the membership consists of both Members and Senators.

The standing orders of both Houses are largely silent on the procedures to be followed by joint committees. Therefore, it has become the established practice for such committees to follow Senate select committee procedures, subject to any particular variations, necessitated for example by the provisions of the resolutions appointing them and any further instructions agreed to by both Houses. This practice is based on that at Westminster.<sup>210</sup> However, chairmen of joint committees, when seeking procedural advice, may approach the Presiding Officers or the Clerks of both Houses.

It is essential to an understanding of joint committees to recognise that they are the creatures of both Houses. Neither House may give instructions to a joint committee independently of the other unless both Houses expressly agree to the contrary. However, it is often provided in resolutions appointing joint committees that either House may refer matters for investigation by those committees.<sup>211</sup>

A resolution by the House proposing the establishment of a joint committee defines the nature and limits of the authority delegated to the committee in the same way as a resolution appointing a committee of the House (*see* p. 590). However, it also includes a paragraph stating:

That a message be sent to the Senate acquainting it of this resolution and requesting that it concur and take action accordingly.<sup>212</sup>

<sup>209</sup> Sessional order 28B (g).

<sup>210</sup> *May*, p. 735.

<sup>211</sup> VP 1987-89/85, 86.

<sup>212</sup> VP 1987-89/89.

The Senate considers the resolution and may agree to its provisions, suggest modifications or reject the proposal altogether. Its decision is conveyed to the House by message. Where modifications are proposed, the House may choose to:

- accept them<sup>213</sup>;
- accept them and add modifications of its own;
- reject them;
- reject them and request the Senate to reconsider them<sup>214</sup>, or
- reject them and suggest an alternative.<sup>215</sup>

In the case of a total rejection, or a failure to respond to a message, the House may choose to appoint a committee of the House with the same purposes instead.<sup>216</sup>

Proposals for joint committees have originated in both Houses.

### Types of joint committees

Joint committees are described as 'joint standing committees' or 'joint select committees'. Like committees of the House the latter are seen to have an ad hoc role and generally cease to exist upon reporting, while the former have a long-term role and members hold office for the life of a Parliament. Some committees have simply been called 'joint committees', for example, the former Joint Committee on the Australian Capital Territory which could equally have been called a joint standing committee. While members of the Joint Committee on Pecuniary Interests of Members of Parliament were appointed for the life of the Parliament, the committee was strictly a joint select committee in that it had a definite and limited purpose and was required to report 'within the shortest reasonable period, not later than 90 days after the members of the committee are appointed'.<sup>217</sup>

Joint statutory committees differ from those appointed by resolution, and are discussed later in this chapter (*see* p. 632). Most existing committees appointed by standing or sessional order are given power to confer with similar committees of the Senate, but exist independently of the Senate committees. A similar procedure was followed in the early years of the Parliament in respect of some committees which were established by resolution by each House independently but in the conduct of inquiries became in effect joint committees. For example, the House, having appointed a Select Committee in relation to Procedure in Cases of Privilege, sent a message to the Senate 'requesting it to appoint a similar Committee empowered to act conjointly with the Committee of this House' to which the Senate agreed but the joint select committee reported as a single entity.<sup>218</sup>

### Powers and privileges

Doubts have been expressed as to whether joint committees are invested with the same powers, privileges and immunities as the committees of the individual Houses.<sup>219</sup> This doubt exists because section 49 of the Constitution invests the two Houses and the committees of each House with the powers, privileges and immunities of the House of Commons at federation. No express mention is made of joint committees. If joint committees are not covered by section 49, the implications could have far-reaching and important effects for those without relevant statutory

213 VP 1987-89/150.

214 VP 1974-75/828-9,870.

215 VP 1973-74/139,149.

216 In 1973, a Joint Committee on Environment and Conservation was proposed by the House, rejected by the Senate, and a House Standing Committee on Environment and Conservation

established, VP 1973-74/124-5,247; J 1973-74/216.

217 VP 1974-75/173-4,208-9.

218 VP 1907-08/299,302,505,515,516; *see also* VP 1907-08/370 for order of the House giving extended power to its members on the committee.

219 *See Odgers*, p. 519.

provisions. It should be noted that section 3 of the *Parliamentary Privileges Act 1987* provides that, in the Act, 'committee' means a committee of a House or of both Houses (and subcommittees). While committees may not have used their power to compel, for example, the giving of evidence and production of documents, the existence of the power has at times encouraged reluctant witnesses to give important evidence.

In response to a request by the Joint Committee on War Expenditure in 1941, the Solicitor-General advised that in his opinion absolute privilege attached to evidence given before a joint committee just as it did to evidence given before a select committee of one House. He also gave the opinion that a joint committee authorised to send for persons, papers and records had power to summon witnesses. He suggested that it was doubtful, however, whether a joint committee had the power to administer oaths to witnesses.<sup>220</sup>

## Quorum

The Houses may fix the quorum of their respective members required to constitute a sitting of a joint committee. Subject to this a joint committee fixes its own quorum.<sup>221</sup> Normally the quorum is stated in the resolution of appointment and no specific provision is made as to the number of Senators or Members, respectively, required to form a quorum. The effect has been that a quorum may be maintained by Members of one House only.<sup>222</sup> This has not prevented some joint committees from maintaining an informal quorum arrangement where the committee agrees that it is not properly constituted unless there is at least one representative from each House. The Joint Committee on Publications is one committee where such a provision prevails.

The resolution of appointment of the Joint Standing Committee on the New Parliament House provided that five members of the committee, one of whom was either the Speaker or the President, constituted a quorum of the committee.<sup>223</sup>

The quorum of the Joint Standing Committee on Electoral Matters, which has 10 members, has been fixed at four.<sup>224</sup>

## Meetings

Standing order 386 provides:

Whenever either House agrees to a proposal from the other House for the appointment of a joint committee, the first meeting of such committee shall be held at such time and place as is named by the House in which the proposal did not originate.

Senate standing order 354 contains a similar provision. In practice these provisions are no longer applied.<sup>225</sup> The first meeting is normally convened by the chairman of the committee, if appointed, or by the committee secretary, if the chairman is to be elected.

The following specific provisions of Senate standing order 297A for the convening of meetings apply to joint committees:

220 Opinion of Solicitor-General, dated 8 August 1941.

221 S.O. 387; Senate S.O. 353. The last occasion the Houses fixed the quorum of their respective Members was for the Joint Select Committee of Public Accounts for which the quorum included at least one Member of each House, VP 1932-34/118-19; J 1932-34/45,46; see also Joint Select Committee on the Moving-picture Industry, VP 1926-28/294,303.

222 Joint Committee on Foreign Affairs, Defence and Trade has 19 Members of the House and 10 committee members, including six government members, are required to constitute a quorum, VP 1987-89/85-6.

223 VP 1987-89/39-40.

224 VP 1987-89/123.

225 For a precedent see the Joint Select Committee of Public Accounts, VP 1932-34/109,118-19, J 1932-34/45,46.

Notice of meetings subsequent to the first meeting shall be given by the Clerk attending the Committee (a) pursuant to resolution of the Committee, (b) on instructions from the Chairman or (c) upon a request by a Quorum of Members of the Committee:

Provided that, in Committees consisting of less than seven Senators, the request is made by not less than three Members of the Committee.

Joint committees could be denied the attendance of Senators if they sit during sittings of the Senate<sup>226</sup>, and there has been a convention that they not sit during sittings of the Senate, unless authorised by the Senate. However, in September 1987 the Senate liberalised this restriction by the adoption of sessional order 300A<sup>227</sup> and Senators were then permitted to attend meetings of committees during sittings of the Senate for the purpose of deliberating in private session. Before this time, leave to sit during sittings of the Senate had been granted on motion<sup>228</sup> but such leave had not been granted lightly or often. Occasionally resolutions of appointment have authorised joint committees to sit during the sittings of either House of the Parliament.<sup>229</sup> The attitude has been taken that leave was required only of the Senate because House of Representatives committees are permitted to meet during sittings of the House.<sup>230</sup>

### Election or appointment of chairman

In the 35th Parliament, it was provided in the resolutions of appointment that the Joint Committees on Electoral Matters, and Foreign Affairs, Defence and Trade, elect a government member as each committee's chairman. In respect of the Joint Standing Committee on the New Parliament House, the resolution provided for the Speaker and President to be joint chairmen.<sup>231</sup>

However, the provisions for election or appointment of chairmen have not always been consistent. The variety of possibilities is well illustrated by the provisions made for the joint committees appointed in the 28th Parliament. In each case, except that of the Joint Committee on Prices, the procedure arrived at was after initial rejection by the Senate of the relevant provisions of the resolution of appointment conveyed to it by the House, namely, nomination by the Prime Minister or from the government Members. The final provisions were as follows:

- Joint Committees on the Australian Capital Territory and Foreign Affairs and Defence: chairman to be elected from one of the members nominated by the Prime Minister or by the Leader of the Government in the Senate<sup>232</sup>;
- Joint Committee on the Northern Territory: chairman to be elected from one of the members nominated by the Prime Minister<sup>233</sup>, and
- Joint Committee on Prices: chairman nominated by the Prime Minister from the government members of the committee.<sup>234</sup>

In 1941, the chairmen of several joint committees were appointed by name in the resolution establishing the committees.<sup>235</sup> In some instances the House requested the Senate to appoint a Senator as chairman, which it did.<sup>236</sup> Such a request was

226 Senate S.O. 300; J 1974-75/655; see also *Odgers*, p. 498.

227 J 1987-89/97, 100.

228 J 1974-75/655.

229 Joint Committee on Profits, VP 1940-43/158-9,162; Joint Committee on Constitutional Review, VP 1956-57/168-9,171 (the name of the committee was altered from Joint Committee on Constitutional Change see PP 50(1957-58)4).

230 S.O. 333.

231 VP 1987-89/39,40.

232 VP 1973-74/58-9,139,149; VP 1973-74/52-3,138-9,148.

233 VP 1973-74/59,100,312.

234 VP 1973-74/53-4,64-5,125.

235 Joint Committee on Social Security, VP 1940-43/158,161-2.

236 Joint Committee on Profits, VP 1940-43/158-9,162.

again made and agreed to in 1957 in relation to the Joint Committee on Constitutional Review.<sup>237</sup>

Resolutions of appointment have at times specified that the deputy chairman be a member of a different House from the chairman.<sup>238</sup>

## Voting

Senate standing orders provide that the chairman of a Senate select committee shall have a deliberative vote only, and that when the votes are equal the question shall pass in the negative.<sup>239</sup> This rule is applied to the relatively few joint committees whose resolution of appointment does not determine the chairman's voting powers.<sup>240</sup> The resolution of appointment of the Joint Committee on Foreign Affairs, Defence and Trade does not provide for an equality of voting, hence the provision in the Senate standing order applies.<sup>241</sup>

It is common to include in the resolution of appointment the following paragraph:

In the event of an equality in voting, the chairman, or the deputy chairman when acting as chairman, shall have a casting vote.<sup>242</sup>

This is in effect a second vote which is in addition to the chairman's deliberative vote.

The Joint Standing Committee on the New Parliament House had joint chairmen. Its resolution of appointment provided that in matters of procedure, each of the chairmen, whether or not occupying the chair, had a deliberative vote and, in the event of an equality of voting, the chairman occupying the chair had a casting vote. In matters other than those of procedure each of the chairmen, whether or not occupying the chair, had a deliberative vote only.<sup>243</sup>

## Admission of strangers and others

The standing orders of the House and the Senate contain similar provisions for the admission of strangers and of Senators and Members who are not members of the committee.<sup>244</sup> However, there is a different interpretation of the standing orders by the Senate, and it is this interpretation which is followed with joint committees.

Strangers may be excluded at the request of any committee member, but only following a majority decision of the committee. The chairman has discretion to exclude strangers but should exercise it only in cases of misconduct.<sup>245</sup> The same practice applies to any request by a committee member or the chairman for the exclusion of a Member or Senator who is not a committee member. Members, Senators and strangers must always withdraw when the committee is deliberating, in accordance with the standing orders.

## Tabling of reports and minutes

The standing orders provide that the proceedings of every joint committee shall be reported to the House by the members appointed by it to serve on the committee

237 VP 1956-57/168-9 (committee originally named Joint Committee on Constitutional Change) 171,341.

238 Joint Committee on the Parliamentary Committee System, VP 1976-77/59,74,82.

239 Senate S.O. 298.

240 Joint Committee on the Australian Capital Territory, VP 1980-83/54-5,69.

241 VP 1987-89/85-6.

242 VP 1987-89/86-7, 88-9.

243 VP 1987-89/39-40.

244 S.O.s 337, 338; Senate S.O.s 305, 306.

245 *Odgers*, p. 503.



(but see p. 613).<sup>246</sup> The provision of the Senate standing orders is similar except that one of the Senators appointed to the committee is required to report.<sup>247</sup> Reports by joint committees are dealt with in the same manner as the reports of House or Senate select committees except that joint committee reports are directed to, and presented in, both Houses. In the House reports may be presented at any time when other business is not before the House.<sup>248</sup> However by sessional order in the 35th Parliament the opportunity for presenting reports was specifically provided each sitting Thursday morning. The sessional orders also contained provisions for Members presenting reports to make statements and move appropriate motions.<sup>249</sup> Senate standing orders do not require the tabling of minutes of proceedings with a committee's report.

Usually reports are presented to both Houses on the same day but occasionally this is not possible, for example, when only one House is sitting and there is an urgent need for the report to be presented and published.<sup>250</sup> A motion for the printing of a report need only be moved in one House.

### Publication of evidence

As the Senate standing orders empower committees to authorise publication or disclosure of their evidence, this power does not need to be incorporated in the resolution of appointment of joint committees.<sup>251</sup>

### Endorsement of papers

Under Senate standing orders the chairman, rather than the committee secretary, is required to endorse any papers and documents sent for by the committee or produced by witnesses.<sup>252</sup>

### Payment to witnesses

Payments to witnesses, which are occasionally made at the committee's discretion, have regard to the scale of witnesses' expenses prescribed by High Court Rules.<sup>253</sup>

### Witness in prison

When a witness is in the custody of the keeper of any prison, the keeper may be ordered to bring the witness in safe custody for examination from time to time.<sup>254</sup> If a joint committee were to require a witness to be brought from prison, it would appear to be desirable that the warrant be issued jointly by the Speaker and the President.

246 S.O. 389.

247 Senate S.O. 355.

248 S.O. 102.

249 Sessional orders 102A and 102B.

250 'Prices of household soaps and detergents', *Report from the Joint Committee on Prices*, PP 326 (1974): Tabled in the Senate and ordered to be printed on 15 August 1974, J 1974-75/155; tabled in the House on 19 September 1974, VP 1974-75/177.

251 Senate S.O. 308. But for precedents for the provision being included in the resolution of appointment see Joint Committee on the Australian Capital Territory and Joint Committee on the New Parliament House, respectively, VP 1980-83/54-5,56-7. And see the Parliamentary Papers Act and the Parliamentary Privileges Act (s. 16).

252 Senate S.O. 314.

253 Senate S.O. 318.

254 S.O. 361, Senate S.O. 389. And see *Parliamentary Privileges Act 1987*, s.14

## JOINT STATUTORY COMMITTEES

**Parliamentary Standing Committee on Public Works***Appointment*

The Parliamentary Standing Committee on Public Works is established by the *Public Works Committee Act 1969*, and is appointed as soon as practicable after the commencement of the first session of each Parliament. The Act prescribes the committee's powers, functions and procedures. In some respects procedural requirements vary from those for ordinary committees.

The committee is a joint committee consisting of six Members of the House of Representatives and three Senators who are appointed by motion by their respective Houses<sup>255</sup> and hold office during the pleasure of the House by which they were appointed. A Minister, the Speaker, the President of the Senate or the Chairman of Committees of either House is not eligible for appointment to the committee.

A member may resign by writing to the Speaker or the President, as the case may be. When a Member of the House resigns, a motion is moved in the House by a Minister discharging the Member from attendance on the committee and appointing another Member.<sup>256</sup> Appointments to the committee, and any changes in membership, are notified to the other House by message.

*Procedures*

The chairman and vice-chairman of the committee are elected by the members. The member presiding at a meeting has both a deliberative and a casting vote.

The committee has the power to move from place to place and to meet during any recess but may not meet whilst either House is sitting except by leave of the House concerned.<sup>257</sup>

The quorum of the committee is five members. As there is no requirement in the Act for the presence of members of both Houses in the make-up of a quorum, the quorum can consist of members of one House only.

The Act requires that minutes be kept of its proceedings and that the committee lay before each House, within 15 sitting days of that House after 31 December each year, a report, known as the General Report, of its proceedings during the previous year.

The committee has the power to appoint sectional committees (subcommittees) of three or more members, the chairman and vice-chairman of which are elected by the members of the sectional committee. There can be no more than two sectional committees at the same time. A majority of members of a sectional committee is required to form a quorum. The committee may refer to a sectional committee, for inquiry and report to the committee, a matter connected with a public work that has been referred to the committee under the Act.

*Functions and inquiries*

The Act provides that the committee shall consider each public work referred to it, and report to both Houses concerning the expedience of carrying out the work. It may also report on any other matters related to the work where the committee thinks it desirable that its views should be reported to the Houses. In its report the committee may recommend any alterations to the work which it thinks

255 VP 1987-89/115.

256 VP 1985-87/714.

257 Leave is given from time to time, VP 1978-80/202.

necessary or desirable to ensure that the most effective use is made of public moneys. In considering and reporting on a public work, the committee has regard to:

- the stated purposes of the work and its suitability for that purpose;
- the necessity for, or the advisability of, carrying out the work;
- the most effective use that can be made, in the carrying out of the work, of the moneys to be expended on the work;
- where the work purports to be of a revenue-producing character, the amount of revenue that it may reasonably be expected to produce, and
- the present and prospective public value of the work.

A motion may be moved in either House that a public work be referred to the committee for consideration and report.<sup>258</sup> If the Parliament is not in session or the House is adjourned for more than a month or for an indefinite period, the Governor-General (in council) may refer a work to the committee for consideration and report.

Since the inception of the committee, departments and to an extent the committee itself have regarded "works" as being limited to those of a permanent architectural or engineering nature carried out for or by the Commonwealth Government. Movable works, such as the construction of a ship, have long been regarded as being of the nature of specialised procurements which ought not be subject to the Act. However, in recent years, legal advice to the effect that movable works may in certain circumstances indeed be works within the terms of the Act, called this view into question. To remove the ambiguity as to what comes within the definition of a "work" for the purposes of the Act the *Administrative Services Legislation Amendment Act 1989*<sup>259</sup> provides that a "work" means an architectural or engineering work and specifically excludes intangible things, movable works and engineering equipment not being integral components of a work. The definition of a "work" was also expanded to ensure that works financed by deferred payment or similar arrangements would be referred to the committee. The 1989 amendments also provided that after consultation with the committee, types of works can be declared to be works or public works by regulation. Similarly, types of works can also be declared not to be works or public works by regulation. The approach is intended to facilitate consideration of new types of projects and delivery systems and to meet changing circumstances.

A public work referred to the committee cannot be commenced unless, after the report of the committee has been presented to both Houses, the House of Representatives has resolved that it is expedient to carry out the work.<sup>260</sup> A proposal in 1968 to amend the Act to give the Senate a greater role in this regard was rejected.

If the estimated cost of a public work exceeds \$6 million, that work cannot be commenced unless it has been properly referred to the committee; or the House of Representatives has resolved that, because of the urgency of the work, it is expedient that the work be carried out without having been referred to the committee; or it is a work of an authority that has been exempted by regulation; or the Governor-General has declared that the work is for defence purposes and reference of it to the committee would be contrary to the public interest; or it has, with the agreement of the committee, been declared to be work of a repetitive nature. Following the

258 VP 1987-89/830.

259 Act No. 5 of 1989.

260 VP 1987-89/985.

1989 amendments the estimated cost was defined as the estimate of cost made at the stage of design development at which all particulars of the work substantially affecting its cost have been determined. This allows works to be referred to the committee where because of their nature only limited design work can be completed before committee consideration is necessary.

Before commencement of a public work, the subject of an earlier report of the committee, both Houses may resolve that, for reasons or purposes stated in the resolution, the public work concerned be re-examined by the committee and a further report produced. The committee itself may also resolve to review a public work on which it or one of its predecessors has reported, if the work has not commenced. The work shall not then be commenced, other than under certain circumstances specified in the Act, until the committee has reported to both Houses. The Chair has ruled that the only amendment permissible, under the provisions of the Act, to a motion for approval of work is one which refers the work back to the committee for consideration and report.<sup>261</sup>

The *Public Works Committee Amendment Act 1981*<sup>262</sup> brought the works of statutory authorities, Commonwealth instrumentalities and other bodies, as well as overseas works, under the purview of the committee. Some authorities and types of works will continue to be exempt from the Act because of their special nature. The works of the Northern Territory Government and the Administration of Norfolk Island are exempted because of the relationships between the administrations and the Commonwealth, while Commonwealth works in these Territories will continue to be subject to review by the committee. Similarly, the works of bodies established jointly by the Commonwealth with the States or other countries are exempted, as are overseas aid works because of their bilateral nature. The works of the tertiary education institutions in the Australian Capital Territory are exempted. Regulations may be made to exempt certain authorities which trade, or which provide services and compete with the private sector.

The 1981 amendment also made provision for specific works of authorities which are not subject to the Act to be declared examinable by the committee. In respect of urban land development works, the committee may report without inquiry. With regard to overseas works, the committee is not permitted to conduct inquiries nor to take evidence in overseas countries; the committee is limited to the consideration of plans, models and statements placed before it, and to the taking of evidence from persons already in Australia. The works of authorities became subject to the Act on 10 April 1982. The 1989 amendment brings works which were formerly carried out by the National Capital Development Commission within the purview of the committee, with the exception of works within the Parliamentary Zone and works of a territorial or municipal nature.

### *Reports*

The committee normally presents its reports to both Houses in the same manner as select and standing committees. However, in 1920, the committee was given leave to continue its investigation during a recess and to present an interim report to the Governor-General<sup>263</sup>, as finalisation of the report was a matter of grave urgency.<sup>264</sup>

The Public Works Committee Act does not provide for committee members to add a protest or dissent to the committee's reports. In 1923, a member of the

261 VP 1970-72/264; H.R. Deb. (26.8.70) 510.

262 Act No. 20 of 1981.

263 VP 1920-21/473. Interim report tabled, VP1920-21/480.

264 H.R. Deb. (26.11.20) 7165-6.

committee tabled a minority report and moved that it be printed.<sup>265</sup> Presentation of the minority report was opposed by the committee's chairman who indicated that the committee had decided that dissenting reports should not be tabled and that because the Act required that 'resolutions moved in the committee shall be included in its reports' any member's dissent was thus on record.<sup>266</sup> The debate was adjourned and the Solicitor-General's advice was sought. On resumption of the debate the Prime Minister stated:

The opinion of the Solicitor-General is that there can be one report only from the Public Works Committee, namely, the majority report, but there is nothing to prevent what is, to all intents and purposes, a minority report being submitted to Parliament by way of an addendum, provided that the majority of the Committee authorise it.<sup>267</sup>

The House did not authorise the printing of the minority report, as the committee had not authorised its presentation.<sup>268</sup> In 1955, attention was again drawn to the difficulties of committee members who differ from the views expressed in the committee's reports. A Senator, who was a member of the committee, moved for the adoption of a report of the committee in order to create for himself an opportunity to express his dissent from it.<sup>269</sup>

In determining whether a committee member may add a dissent to a committee report, it would seem appropriate that the committee have regard to the provisions of the standing orders of both Houses which indicate the contemporary attitude of the Houses on the subject. Both Houses now permit a Member or a Senator to add a protest or a dissent to a report by a select or standing committee<sup>270</sup> (see p. 612 for alternative means of recording dissent).

### *Evidence*

The chairman, or a member authorised by resolution of the committee, may summon a person to appear before the committee to give evidence and to produce such documents as are referred to in the summons. There is no instance of a summons being issued. If a witness, who has been summonsed, fails to appear or fails to continue in attendance in obedience to the summons, the chairman or a member authorised by the committee may issue a warrant for the witness's apprehension. The person executing the warrant may bring the witness before the committee and detain the witness in custody until released by order of the chairman or the authorised member.

Evidence may be taken on oath or affirmation administered by the chairman.

In 1953, the Secretary of the Attorney-General's Department gave the following advice on the committee's power to summon before it a State public servant:

With regard to the States, I entertain a good deal of doubt, firstly, whether as a mere matter of construction the Crown in right of the States would be bound by the Act without express mention and secondly, whether, if the Act is to be read as intending to bind the Crown in right of the States, the High Court would regard such a law as within the competence of the Commonwealth Parliament. In short, I would think the matter so doubtful that I would advise against making a test case by summoning a State officer.<sup>271</sup>

The Act in its present form still does not bind the Crown in right of the States by express mention.

265 VP 1923-24/73.

266 H.R. Deb. (12.7.23)1033.

267 H.R. Deb. (19.7.23)1325.

268 VP 1923-24/83.

269 S. Deb. (26.5.55) 495.

270 S.O. 343; Senate S.O. 311 (which applies to standing committees pursuant to S.O. 37A).

271 Advice of Attorney-General's Department, dated 16 September 1953.

The committee, and its sectional committees, may consider evidence taken by a former Public Works Committee, or sectional committee, if it ceased to exist before reporting on the matters to which that evidence related.

Evidence is normally taken in public but may be heard in camera. If so requested by a witness, and in relation to the giving of evidence or the producing of a document concerning a secret or confidential matter, the committee is required to take evidence in camera or direct that a document, or part of it, be treated as confidential. Such evidence may not be disclosed or published by a member of the committee or any person without the written consent of the witness or written authority of the committee. The Act prescribes a penalty of \$400 or imprisonment for one year for breach of these disclosure provisions.

Witnesses before the committee have the same protection and privileges as a witness in proceedings in the High Court.<sup>272</sup> This provision has been interpreted as giving to witnesses the right to refuse to answer certain types of questions which they could be forced to answer before a select or standing committee<sup>273</sup> (see p. 651). Further, a witness is protected against proceedings for defamation in respect of anything the witness may say during an inquiry with reference to the matter under investigation.

Several penalties are specified in the Act. Wilfully giving false evidence on oath or affirmation is punishable by five years' imprisonment. A witness who has been summonsed to appear before the committee but, without reasonable excuse (proof of which lies upon the witness), fails to appear or fails to continue in attendance whilst attendance is required, is subject to a fine of \$400 or one year's imprisonment. A similar penalty applies where:

- a person knowingly dissuades or prevents a person from obeying a committee summons;
- a witness refuses to make an oath or affirmation answer a question by a committee member, or produce a document the witness is required by summons to produce, or
- a person is responsible for any violence to, or punishment of, a witness or potential witness because of evidence given lawfully by that witness before the committee.

Again in these instances proof of reasonable excuse lies upon the witness or person, as the case may be. These provisions have the effect of leaving it to the courts to make determinations on matters which, in the case of other parliamentary committees, would be determined by the Houses themselves. Proceedings in respect of an offence against the Act shall not be instituted except by the Attorney-General or with the Attorney-General's consent in writing.<sup>274</sup>

The committee may authorise a member, or other person acting on behalf of the committee, to enter and inspect any land, building or place, and to inspect any material on the land or on or in the building or place. Notice must be given by the committee to the occupier, in accordance with regulations, before this is done. Currently, no such regulations exist.

#### *Staff and expert assistance*

The committee has a small secretariat employed by the Department of the House of Representatives. It also has authority under the Act to appoint assessors (specialist advisers).

<sup>272</sup> *Public Works Committee Act 1969*, s. 25.

<sup>273</sup> See *Joint Committee of Public Accounts*, 17th

*Report*, PP 30 (1954-55) 14.

<sup>274</sup> *Public Works Committee Act 1969*, s.34.

## Joint Committee of Public Accounts

### *Appointment*

The Joint Committee of Public Accounts is established by the *Public Accounts Committee Act 1951*, and is appointed as soon as practicable after the commencement of each Parliament. As with the Public Works Committee, the Act provides for the committee's functions, constitution and powers.

The committee consists of 10 Members of the House and five Senators who are appointed by motion by their respective Houses and hold office during the pleasure of the House by which they were appointed, or until the House of Representatives expires by dissolution or effluxion of time. A Member not wishing to serve further on the committee should notify the appropriate party whip in writing. A motion is then moved by a Minister in the House, by leave, discharging the Member from attendance on the committee and appointing another Member.<sup>275</sup> Appointments to the committee, and any changes in membership, are notified to the other House by message.

In addition to the 15 members appointed by the respective Houses, the chairman of the House of Representatives Standing Committee on Expenditure, when constituted, became an ex officio member of the committee but was not eligible to be elected as its chairman. Two Senators have been elected chairman of the Public Accounts Committee since it was first established in 1913.<sup>276</sup>

### *Procedures*

The chairman of the committee and a vice-chairman are elected by the members. If both the chairman and vice-chairman are absent from a meeting the members present may appoint one of their number to preside at the meeting. The member so elected has all the powers and functions of the chairman in relation to the meeting concerned.

The quorum of the committee is six members. As there is no requirement in the Act for the presence of members of both Houses in the make-up of a quorum, the quorum can consist of members of one House only.

All questions are decided by a majority of the votes of members present and the chairman, or the member presiding, has both a deliberative and a casting vote. Unless members vote unanimously, the manner in which each member votes shall, if a member demands it, be recorded in the minutes and in the committee report.

The committee is empowered to appoint sectional committees (subcommittees) consisting of three or more members to inquire into and report to the committee upon such matters, within the committee's terms of reference, as the committee directs. There is no limitation on the number of sectional committees. With minor exceptions provisions in the Act applying to the committee also apply to its sectional committees. Similarly, provisions applying to the committee's chairman and vice-chairman apply to their counterparts in sectional committees. A sectional committee may sit at any time notwithstanding that the committee is sitting at the same time.

The 1979 amendment to the Act empowers the committee to meet and transact business notwithstanding any prorogation of the Parliament. It also empowers the committee to meet at such times within Australia as the committee by resolution determines. This has been interpreted to mean that the committee may meet while the Senate is sitting which is not consistent with the general theory 'that the duty of a Senator is first to the Senate, and that he should not subordinate that duty to

275 VP 1987-89/435, 472.

276 Senator R.E. McAuliffe was chairman from 1973

to 1975 and Senator G. Georges from 1985 to 1987.

any lesser duty'.<sup>277</sup> The committee policy however is generally to avoid public hearings while either House is sitting. Up until 1983 the committee had infrequently sought, and generally received, the authority of the Senate through standing orders being suspended to permit the Senate members of the committee to attend meetings during sittings of the Senate. In that year a number of requests to the Senate, following changes in the sitting times of that House, were refused (*and see* p. 629).

The committee may meet at any place within Australia but the Act expressly precludes it from meeting outside Australia.

### *Functions and inquiries*

The functions of the committee are:

- to examine the accounts of the receipts and expenditure of the Commonwealth including the financial statements transmitted to the Auditor-General under subsection 50 (4) of the *Audit Act 1901*;
- to examine the financial affairs of authorities of the Commonwealth, and of inter-governmental bodies, to which the Public Accounts Committee Act applies;
- to examine all reports of the Auditor-General (including reports of the results of efficiency audits) copies of which have been laid before the Houses of the Parliament;
- to report to both Houses of the Parliament, with such comment as it thinks fit, any items or matters in those accounts, statements and reports, or any circumstances connected with them to which the committee is of the opinion that the attention of the Parliament should be directed;
- to report to both Houses of the Parliament any alteration which the committee thinks desirable in the form of the public accounts or in the method of keeping them, or in the mode of receipt, control, issue or payment of public moneys, and
- to inquire into any question in connection with the public accounts which is referred to it by either House of the Parliament, and to report to that House upon that question.

The functions also include such other duties as are assigned to the committee by joint standing orders approved by both Houses of the Parliament. In 1985 the committee's standing reference to investigate and report on proposed acquisitions of automatic data processing facilities by Commonwealth departments and authorities staffed under the *Public Service Act 1922* was formalised by motions passed by both Houses. The resolutions were to continue in force unless and until amended or rescinded by the Senate or the House of Representatives in the 34th or subsequent Parliaments.<sup>278</sup> Following a report to the Government by an efficiency scrutiny unit appointed in the 35th Parliament, the method of acquisition of information technology facilities was changed. The new process no longer required proposals to be automatically referred to the committee but allowed Ministers to refer matters to the committee or any other appropriate parliamentary committee for scrutiny. The House of Representatives rescinded the resolution in March 1989.<sup>279</sup>

In 1979, the Public Accounts Committee Act was amended<sup>280</sup> to give the committee express powers to examine the financial affairs of certain Commonwealth

277 *Odgers*, p. 498.

278 VP 1985-87/204.

279 VP 1987-89/1055.

280 Act No. 187 of 1979.



authorities and inter-governmental bodies. Authorities subject to such examination are defined as:

- a body corporate or an unincorporated body established for a public purpose by, or in accordance with the provisions of, an enactment, not being an inter-governmental body;
- a body established by the Governor-General or by a Minister otherwise than in accordance with an enactment, and
- an incorporated company over which the Commonwealth is in a position to exercise control.

The committee may only examine the financial affairs of an inter-governmental body if, and for as long as, the parties to the agreement establishing the body consent to the committee having the power to do so. The consent or withdrawal of consent (which may result from withdrawal of consent by any party to the agreement) is notified to the relevant Minister who then gives it formal effect by notice in the Gazette. An inter-governmental body is defined as a body corporate, or an unincorporated body, established by, or in accordance with the provisions of, an agreement between the Commonwealth and a State or between the Commonwealth and the government of another country.

The committee does not have the power to examine the financial affairs of the Northern Territory or of the administration of an external territory or to examine reports by the Auditor-General which relate to, or in so far as they relate to, such affairs. The committee is also not empowered to examine the results of an efficiency audit of operations of the administration of an external territory.

### *Reports*

After a committee report is tabled the chairman forwards a copy to Ministers affected. The chairman also forwards a copy to the Minister for Finance with a request that the Minister consider the report and inform the chairman of the action taken to deal with the committee's conclusions. The reply is received in the form of a Department of Finance Minute which is examined by the committee. If the committee is dissatisfied with the response it may seek further information as clarification or elaboration prior to presenting a report to Parliament.<sup>281</sup> During the 35th Parliament the committee resolved to present all Department of Finance Minutes as a single report annually unless a minute is urgent, lengthy or for some other reason requires immediate reporting to Parliament.<sup>282</sup> The Public Accounts Committee Act, like the Public Works Committee Act, makes no provision for minority reports. However, the committee has permitted a minority report<sup>283</sup> and this is in accord with the contemporary attitude of both Houses (*see* p. 635).

### *Evidence*

The committee may summon a person to appear before it to give evidence and produce documents. The summons must be signed by the chairman or the vice-chairman. If a witness who has been summonsed fails to appear or fails to continue in attendance in obedience to the summons without showing proof of reasonable excuse, the chairman or the vice-chairman may issue a warrant for apprehension of the witness. The person executing the warrant may bring the witness before the committee and detain that witness in custody until release by order of the chairman

281 *Joint Committee of Public Accounts, 255th Report*, PP 70 (1987).

282 *Joint Committee of Public Accounts, 291st Report*, PP 146 (1988) 3.

283 *Joint Committee of Public Accounts, 18th Report*, PP 37 (1954-55) 25; and *see Odgers*, p. 510.

or the vice-chairman. A person must not knowingly dissuade or prevent a person from obeying a summons.

Evidence may be taken on oath or affirmation and the chairman or vice-chairman may administer oaths or affirmations to witnesses. A person who wilfully gives false evidence on oath or affirmation is subject to a penalty of five years' imprisonment.

A person summonsed to appear before the committee may not refuse, without just cause (proof whereof lies upon the witness), to be sworn or make an affirmation, answer any question put to that person by the committee or any member, or produce a document required by the committee or a member. (For the committee's attitude towards questioning public servants on government policy *see* p. 648).

A witness has the same protection and privileges as a witness in proceedings in the High Court (*see* p. 636). The Act also provides a witness with legal protection against any physical or other harm which may be inflicted on the witness for or on account of the witness having appeared before the committee as a witness, or lawfully giving evidence before the committee.

A witness is entitled to fees and travelling expenses allowed by the chairman or vice-chairman in accordance with a prescribed scale.

The Act requires the committee, normally, to take evidence in public. However, the committee may take oral or documentary evidence in camera if, in the committee's opinion, the evidence relates to a secret or confidential matter. If the witness requests that such evidence be taken in camera, the committee is required to do so only if the committee forms the opinion that the evidence to be given is of a secret or confidential nature. If the committee accedes to a request of this kind, neither the committee nor a member of the committee may disclose or publish all or part of the evidence concerned without the consent of the witness in writing. Similarly, a person other than a member of the committee may not publish or disclose such evidence without both the consent of the witness in writing and the authority of the committee. In other instances where evidence is taken in camera no person, including a member of the committee, may publish or disclose the evidence concerned without the authority of the committee in writing and signed by the chairman. With these qualifications the committee has the discretion to disclose or publish, or authorise such disclosure or publication of, evidence taken in camera.

The committee, and its sectional committees, may consider evidence taken by a former Public Accounts Committee, if that committee, or a sectional committee, ceased to exist before reporting on the matters to which that evidence related.

It is an offence to contravene or fail to comply with provisions of the Act. Such contravention may be punished by fine or imprisonment. An offence against the Act cannot be prosecuted summarily without the written consent of the Attorney-General or of a person authorised by the Attorney-General, and an offence can only be prosecuted on indictment in the name of the Attorney-General.

#### *Staff and expert assistance*

The committee has a secretariat employed by the Department of the House of Representatives. It has also employed specialist advisers on a part-time basis.

The committee is also assisted by official observers: the Secretary to the Department of Finance and the Auditor-General. Their representatives sit at the table with committee members at all public hearings and are invited to comment on evidence presented.

### Joint Committee on the Broadcasting of Parliamentary Proceedings

The Joint Committee on the Broadcasting of Parliamentary Proceedings is established as soon as practicable after the commencement of each Parliament pursuant to the *Parliamentary Proceedings Broadcasting Act 1946*.

The committee consists of the Speaker and the President of the Senate, who are ex officio members, and five Members of the House of Representatives and two Senators appointed by their respective Houses by motion.<sup>284</sup> Members of the committee hold office as a joint committee until the House of Representatives expires by dissolution or effluxion of time. The quorum of the committee is five members. Any member, other than the Speaker and President, may resign his or her seat on the committee by writing addressed to the Speaker, or the President, as the case may be. When a Member of the House resigns, a motion is moved in the House by a Minister discharging the Member from attendance on the committee and appointing another Member. There is no precedent for this in the House of Representatives.<sup>285</sup> Vacancies in the committee must be filled by the House concerned within 15 sitting days of the vacancy occurring if that House is then sitting, or, if not, then within 15 sitting days after the next meeting of that House. Appointments to the committee, and any changes in membership, are notified to the other House by message.

The Act provides for the committee to:

- consider and specify in a report to each House the general principles upon which there should be determined the days upon which, and the periods during which, the proceedings of the Senate and the House should be broadcast;
- determine the days upon which, and the periods during which, the proceedings of either House should be broadcast, in accordance with the general principles specified by the committee and adopted by each House (*see below*), and
- determine the days upon which, and the periods during which, the proceedings of a joint sitting should be broadcast.

The committee has the power to make such arrangements as it thinks fit for the permanent safe keeping of recordings of proceedings in either House which are considered to be of sufficient historic interest. The committee also determines the conditions in accordance with which a re-broadcast may be made of any portion of the proceedings of either House.

In 1974, the Act was amended to provide for the televising of the joint sitting of both Houses in that year. The amendments gave the committee special powers in relation to both the broadcasting and televising of those proceedings.<sup>286</sup>

The committee may delegate to a subcommittee the power to determine the days on which, and the periods during which, the proceedings of either House shall be broadcast, and any determination of the subcommittee is deemed to be, for the purposes of the Act, a determination of the committee. The flexibility provided by this authority has facilitated urgent broadcasting changes. A subcommittee must consist of two Members of the House of Representatives and two Senators. Because of the possibility that only one House may be sitting, it is provided that two members of the subcommittee shall be sufficient to form a quorum.

In 1973, the Houses referred to the committee for investigation and report 'whether the televising of portion of the Parliamentary debates and proceedings is desirable, and if so, to what extent and in what manner the telecasts should be

284 VP 1980-83/23; J 1980-83/28.

285 But see J 1973-74/246 for case of Senator; see also VP 1948-49/13 (temporary vacancy); VP

1951-53/673 (death of Member).

286 See Ch. on 'Parliament and the citizen'.

undertaken'. The committee was given the power, for the purposes of the inquiry, to send for persons, papers and records.<sup>287</sup> The committee's report, which concluded that televising of proceedings was desirable in principle, was tabled in 1974.<sup>288</sup> In 1986 the committee reported on the televising and radio broadcasting of proceedings<sup>289</sup>, although decisions were not made on its recommendations. In May 1987<sup>290</sup>, and following decisions relating to sound and vision facilities in the new Parliament House, the committee reported again<sup>291</sup> in connection with the arrangements for broadcasting and televising. No action had been taken on these recommendations as at the end of 1988.

The chairman and vice-chairman are elected by members of the committee at their first meeting or as soon as practicable thereafter. With the exception of one Parliament, the Speaker has always been elected chairman and the President vice-chairman. When both the chairman and vice-chairman are absent a member elected by the members present presides.

All questions arising in the committee are decided by a majority of the votes of the members present, with the chairman, or other member presiding, having a deliberative vote and, in the event of an equality of votes, a casting vote also.

The committee has power to sit during any adjournment or recess as well as during the session, and may sit at such times (including times while either House is sitting) and in such places, and conduct its proceedings in such manner as it deems proper.

Following publication in 1948 of a newspaper article purporting to give details of the committee's proceedings, the matter was raised in the House.<sup>292</sup> The Deputy Speaker subsequently informed the House that the information had not been released officially and that this would normally constitute a breach of privilege. He noted, however, that the committee differed from other statutory and select committees in that it had executive authority and there was no provision for it to report to the House other than in relation to specified general principles. He therefore proposed to consult the committee on the matter.<sup>293</sup> Having done so, the Deputy Speaker made a further statement in the House where he indicated that the joint committee considered the unauthorised publication of its proceedings undesirable and contrary to parliamentary practice. Accordingly, the committee, in pursuance of its statutory powers, declared that, unless otherwise determined, its proceedings would not be open to the public and were not to be published without the chairman's authority. The chairman was empowered to authorise publication of committee decisions, unless the committee specifically determined otherwise. Therefore, any unauthorised publication of the committee's proceedings would be a matter which could be considered by the House to constitute a breach of privilege.<sup>294</sup>

287 VP 1973-74/69-70,137.

288 'Televising of Parliamentary Proceedings', *Report of Joint Committee on the Broadcasting of Parliamentary Proceedings*, PP 61 (1974)4.

289 'Televising and Radio Broadcasting of both Houses of Parliament and their Committees', *Joint Committee on the Broadcasting of Parliamentary Proceedings*, PP 125 (1986).

290 'Provision of sound and vision services in the new Parliament House', *Joint Committee on the*

*Broadcasting of Parliamentary Proceedings*, PP 145 (1987).

291 See also Ch. on 'Parliament and the citizen'.

292 H.R. Deb. (14.10.48) 1659-60.

293 H.R. Deb. (19.10.48) 1749.

294 H.R. Deb. (27.10.48) 2184; VP 1948-49/103. For debate on a similar occurrence in 1947 see H.R. Deb. (23.10.47) 1228-9, 1234-5; H.R. Deb. (24.10.47) 1348-50. But see also Ch. on 'Parliamentary privilege'.

## Joint Committee on the National Crime Authority

### *Appointment*

The Parliamentary Joint Committee on the National Crime Authority is established as soon as practicable after the commencement of the first session of each Parliament in accordance with the *National Crime Authority Act 1984*. The Act prescribes the membership of the committee and its duties but all matters relating to the powers and proceedings of the committee are left to the two Houses to determine by resolution.

### *Membership*

The committee is a joint committee consisting of five Members of the House of Representatives and five Senators who are appointed by their respective Houses.<sup>295</sup> The Speaker, the President of the Senate, the Chairman of Committees of each House and Ministers are not eligible for appointment. Members cease to be members of the committee when the House of Representatives is dissolved or expires by effluxion of time. In the case of an individual member, membership ceases if the member becomes an office holder as specified; if the member ceases to be a member of the House by which the member was appointed; or if the member resigns. A member may resign by writing to the Speaker or the President, as the case may be. When a member resigns, a motion is moved in the relevant House by a Minister discharging that member from attendance on the committee and appointing another member. Appointments and changes in membership are notified to the other House by message.

### *Powers and procedures*

In accordance with section 54 of the *National Crime Authority Act 1984* the two Houses have determined the composition of the membership, that is, the number of government and opposition members on the committee; that the chairman will be a government member; the provisions as to the election of a deputy chairman; the voting rights of the chairman; the quorum provisions; and whether and under what conditions subcommittees are appointed. The Houses have given the committee the power to send for persons, papers and records, to move from place to place and to report from time to time.

### *Duties*

The duties of the committee are set out in section 55 of the Act. They are to monitor and to review the performance by the National Crime Authority of its functions, to report on these matters to both Houses, to examine the annual report of the Authority and to report on any matter appearing in or arising out of the report, to examine trends and changes in criminal activities, practices and methods, and to report to both Houses any changes the committee thinks desirable to the functions, structure, powers and procedures of the Authority, and to inquire into any matter which either House considers appropriate to refer to the committee. In carrying out these duties the committee or any subcommittee should ensure that as far as possible the operational methods and results of investigations of law enforcement agencies are protected from disclosure where that would be against the public interest.<sup>296</sup>

295 VP 1987-89/88.

296 VP 1987-89/89.

*Reports*

The first (1985)<sup>297</sup> and second (1986)<sup>298</sup> reports of the committee dealt with the difficulties the committee was having in its relationship with the National Crime Authority. However these problems were overcome and the committee continued to be reappointed in subsequent Parliaments and made an initial evaluation of the Authority (1988)<sup>299</sup> and reported on witness protection (1988).<sup>300</sup>

*Staff*

The committee has a secretariat employed by the Department of the Senate, and the secretary of the committee is usually an officer with legal qualifications.

### **Parliamentary Joint Committee on the Australian Security Intelligence Organization**

*Appointment*

The Parliamentary Joint Committee on the Australian Security Intelligence Organization is established by the *Australian Security Intelligence Organization Act 1979*, and is appointed as soon as practicable after the commencement of the first session of each Parliament. The committee's functions, procedures and powers are prescribed in the Act.

The committee consists of seven members of whom four are Members of the House of Representatives and three are Senators. The members of the committee who are Members of the House of Representatives are nominated by the Prime Minister; the members who are Senators are nominated by the Leader of the Government in the Senate.

Committee members are appointed by resolution of their respective Houses and hold office during the pleasure of the House by which they were appointed, or until the House of Representatives expires by effluxion of time or is dissolved. A Minister, the Speaker of the House of Representatives, the President of the Senate, the Chairman of Committees of the House of Representatives, and the Deputy President and Chairman of Committees of the Senate are not eligible for appointment to the committee.

A member may resign membership of the committee by notifying the Speaker of the House of Representatives or the President of the Senate, as appropriate. The notice of resignation must be in writing, signed by the member, and delivered to the Speaker or the President, as the case requires. The relevant House is empowered to appoint one of its members to fill a vacancy amongst the members of the committee appointed by that House.

*Procedures*

Meetings of the committee are chaired by a Presiding Member who is elected by the members. If the Presiding Member is not present at a meeting of the committee, the members present elect one of their number to preside at the meeting. The member so elected may exercise all powers and functions of the Presiding Member in relation to that meeting, and any matter arising out of that meeting. The member presiding at a meeting of the committee has both a deliberative and a casting vote.

297 *Joint Committee on the National Crime Authority, 1st report*, PP 501 (1985).

298 *Joint Committee on the National Crime Authority, 2nd report*, PP 439 (1986).

299 'National Crime Authority—An initial evalua-

tion', *Joint Committee on the National Crime Authority*, PP 378 (1988); VP 1987-89/523.

300 'Witness protection', *Joint Committee on the National Crime Authority*, PP 193 (1988); VP 1987-89/585.

The quorum of the committee is four members. There is no requirement in the Act for the presence of members of both Houses in the make-up of a quorum and, consequently, the quorum can consist of Members of the House of Representatives only.

Where members do not vote unanimously on a question, and if a member so requires, the names and manner in which each member voted and the names of members who abstained from voting are to be recorded in the minutes and in the committee report.

The Act requires the committee to keep minutes of its proceedings.

The committee may meet at places within Australia providing that, before a meeting-place is determined, advice is sought from the Director-General of Security regarding the suitability of that place. The committee may meet at such times as it determines and may also meet when the Parliament has been prorogued.

The committee is required by the Act to conduct its reviews, in general, in private. The committee may determine otherwise in relation to its reviews, but in this case, it must also seek the approval of the responsible Minister.

### *Functions*

The functions of the committee are:

- to review aspects of the activities of the Australian Security Intelligence Organization that are referred to the committee, and
- to report to the Minister and, subject to certain conditions prescribed in the Act, to each House of the Parliament, the committee's comments and recommendations following such a review.

The functions of the committee, however, do not include:

- reviewing a matter that relates to the obtaining or communicating by the organization of foreign intelligence;
- reviewing an aspect of the activities of the organization that does not affect any person who is an Australian citizen or a permanent resident;
- reviewing a matter, including a matter that relates to intelligence collection methods or sources of information, that is operationally sensitive, or
- originating inquiries into individual complaints concerning the activities of the organization.

Subject to these provisions, where the Minister refers a particular aspect of the activities of the organization to the committee for review, or when one of the Houses passes a motion that the committee is to review a particular aspect of the activities of the organization, the committee is empowered to review that aspect. In addition, if the committee, by resolution, requests the Minister to refer a particular aspect of the activities of the organization, the Minister may refer that aspect to the committee for review.

### *Evidence*

The committee may require persons to appear before it to give evidence or to produce documents, providing that a minimum of five days' notice, in writing, is given to that person. When these circumstances occur, a copy of the notice must also be given to the Minister. When required to appear before the committee, a person concerned is entitled to be paid, by the Commonwealth, allowances for travelling and other prescribed expenses. Evidence may be taken on oath or affirmation and the Presiding Member may administer an oath or affirmation to a witness.

A person required to give evidence before the committee may not refuse or fail, without reasonable excuse, to be sworn or make an affirmation, to answer the committee's questions, or to produce documents required by the committee. The penalty for refusal or failure to comply, under these provisions, is \$1000 or imprisonment for six months or both. Should a person knowingly give evidence that is false or misleading in a material particular, the penalty is \$5000 or imprisonment for two years or both. In such cases, prosecutions are instituted only by or with the consent of the Attorney-General.

The Minister may on occasion, for reasons relevant to security, determine that a person should not give evidence in whole or in part and/or produce documents to the committee. Under these circumstances, the Minister gives a certificate to this effect to the committee member presiding. A copy of the certificate is also provided to the Speaker of the House of Representatives, the President of the Senate and the person concerned.

Members of the committee, and members of staff of the committee, both current and former, are prohibited from either directly or indirectly recording, divulging or communicating information or documents received, except for the purposes prescribed in the Act. The penalty for such an infringement is \$5000 or imprisonment for two years or both.

Neither members of the committee nor members of staff of the committee, both current and former, can be required by a court to produce documents or information acquired by virtue of their office or employment.

Evidence taken by a committee which ceases to exist before reporting on a matter may be considered by a committee that is constituted at a subsequent time.

#### *Disclosure to Parliament*

Under the provisions of the Act, the committee is prohibited from disclosing in its reports the identity of a current or former officer, employee or agent of the organization. It is also prohibited from publicly disclosing material or information which might prejudice the organization's performance of its functions.

Before presenting its reports, the committee is required to obtain the advice of the Minister as to whether any part of the report should not be disclosed.

#### *Staffing*

The committee has a small secretariat employed by the Department of the House of Representatives.

## **EVIDENCE**

### **Extent of Parliament's investigatory powers**

The power of a committee of inquiry to obtain evidence determines, in large measure, the potential scope and thoroughness of its inquiry. A committee possesses no authority except that which it derives by delegation from the House by which it is appointed (save for statutory committees). A committee cannot require the attendance of witnesses and the production of papers without express authority from the House. A committee is, therefore, normally granted the power to call for persons, papers and records in order that it can properly fulfil its functions.<sup>301</sup>

<sup>301</sup> The nature of these powers is discussed at length in Greenwood and Ellicott, PP 168 (1972).



## Power to send for persons, papers and records

The House empowers most investigatory committees to send for persons, papers and records. Section 49 of the Constitution confers on both Houses the powers, privileges and immunities possessed by the United Kingdom House of Commons in 1901. Section 50 confers on each House the right to make rules or orders concerning its powers and conduct of business. This power extends to committees and is delegated to the committee pursuant to standing orders<sup>302</sup>, by the resolution of appointment, or by the relevant statute. Without such authority a committee has no power to compel witnesses to give oral or documentary evidence. According to *May*, it cannot even request a person to appear as a witness or examine a person who offers to appear in that capacity.<sup>303</sup>

When first appointing the Joint Committee on Foreign Affairs, the Houses imposed an unusual qualification on the committee's power to send for persons, papers and records in the resolution:

. . . the Committee shall have no power to send for persons, papers or records without the concurrence of the Minister for External Affairs and all evidence submitted to the Committee shall be regarded as confidential to the Committee . . .<sup>304</sup>

The Parliamentary Joint Committee on the Australian Security Intelligence Organization has, by virtue of the Act establishing the committee, some limitations in respect of the gathering and use of evidence. These are discussed more fully in the section on that committee (*see* p. 645).

A committee has no authority to consider or use the evidence and records of a similar committee appointed in previous Parliaments or sessions unless specific authority is included in a constituting Act or granted by the House. Authority granted by the House is included in the sessional or standing orders or resolution of appointment.<sup>305</sup>

## Voluntary evidence

### *Invitation of submissions*

It needs to be stressed that most witnesses, far from needing to be compelled to give evidence, welcome the opportunity to do so. Soon after subjects are adopted for inquiry, committees usually advertise their terms of reference and their desire to receive submissions from interested individuals or organisations. In addition, letters inviting submissions are sent directly to those who are thought to have a special interest or expertise in the field under investigation. It is within a committee's discretion to decide whether or not a person who has lodged a submission should be invited to appear as a witness. Sometimes oral evidence is considered unnecessary and no invitation is issued.

Sometimes, depending on the particular circumstances, a person who has not lodged a written submission is granted the opportunity to give evidence at a hearing. Committees need to have some knowledge of the nature of evidence to be presented so that they can determine in advance, for example:

- whether the prospective witness is acting in good faith;
- whether the evidence is likely to be relevant and/or useful in the inquiry;

302 S.O. 334.

303 *May*, p. 697.

304 VP 1951-53/129. In later Parliaments the restrictions on the committee's power to call for evidence were gradually eased, VP 1957-58/13-14, VP 1959-60/25-6, VP 1973-74/52-3.

305 *See* Redlich, vol. II, p. 196; and *see* Standing Committee on Aboriginal Affairs, VP 1980-83/48-9; Select Committee on Tourism, VP 1977/11; Joint Committee on the Australian Capital Territory, VP 1980-83/54-5.

- what lines of questioning they would like to adopt, and
- whether the evidence should be taken in camera.

Occasionally committees send questionnaires to appropriate organisations and the responses to these questionnaires form the basis for questioning at hearings. In 1971, the Select Committee on Pharmaceutical Benefits issued a questionnaire to manufacturers who co-operated with the committee after satisfactory arrangements had been negotiated to ensure security of the responses. The Standing Committee on Expenditure frequently obtained information from departments and authorities by questionnaire.<sup>306</sup>

#### *Evidence from Commonwealth public servants*

In 1984, a Government paper entitled *Government guidelines for official witnesses before parliamentary committees and related matters* was presented to the House. This paper set down similar guidelines to those originally presented in 1978. As the title suggests they are intended to provide general guidance, not inflexible rules, to Commonwealth public servants to cover every possible contingency. Basically their purpose is to:

... assist officials appearing before parliamentary committees, by informing them of the principles they are required by the Government to follow, recognising that the Parliament is entitled to be properly and adequately informed on the operation of the Executive.<sup>307</sup>

The guidelines further set out the Government's views on matters such as: who decides on attendance at committee hearings; the Government's expectations in the content of submissions; privilege considerations; aspects which might give rise to claims for public interest immunity; publication provisions; means of correcting evidence; and discretions relating to the extent to which the guidelines are applied.

Whilst these guidelines have not been accepted or endorsed by either House, they were issued after consultation with parliamentary staff and may be regarded as an attempt to assist government personnel and the Parliament by setting down the basic position of the Executive on a wide range of detailed matters connected with the operations of committees.

In 1969, the Joint Committee of Public Accounts set down its practice on questions to public servants about government policy. This practice, while to some extent reflecting the particular concerns of a Public Accounts Committee, nevertheless represents a sensible balance between meeting the needs of most investigatory committees and recognising the role and responsibility of public servants. The joint committee said:

This Committee does not examine public servants on matters of Government policy. The understanding of Government policy, however, is itself essential to the effective operation of the Committee during specific inquiries as the Committee is concerned with the administrative out-workings of such policy. In these circumstances, the Committee has normally proceeded on the basis of asking public servants to outline for it the particular policy of the Government which is being administered by them. It does not ask public servants, however, to comment on the adequacy of such policies. It is not unusual to find that in the implementation of Government policy, departments and authorities develop administrative policies. In the past, the Committee has regarded this type of policy as within its purview and has examined public servants in the administrative policy field.<sup>308</sup>

This practice is acknowledged in the 1984 government guidelines.

306 PP 244(1977)16-17.

307 VP 1983-84/802.

308 *Joint Committee of Public Accounts, 114th Report*, PP 162(1969)3.

In its April 1989 report *Committee procedures for dealing with witnesses* the Standing Committee on Procedure proposed the adoption by the House of the following provision to be observed by committees of the House:

A departmental officer shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of him or her to superior officers or to the appropriate Minister.<sup>309</sup>

## Means of obtaining evidence

### *Compulsory attendance*

If a person declines an invitation to give evidence, a committee invested with power to send for persons, papers and records may issue a summons, signed by the committee secretary, ordering the person to attend before it and to bring such documents as the committee specifies.<sup>310</sup> The form of the summons is not prescribed by standing orders or by statute.

It appears to have been the practice of committees established in the early years of the Parliament to issue what were called 'summonses' to prospective witnesses, whether or not they had shown any reluctance to appear. Contemporary practice is for prospective witnesses to be invited to attend on the committee.

In its 1989 report on procedures for dealing with witnesses the Procedure Committee proposed the adoption of the following provision:

A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.

In 1963, the Joint Select Committee on Parliamentary and Government Publications summonsed two witnesses to appear before it. The witnesses were required to give evidence in relation to alleged threats to a witness because of evidence he had given to the committee (see p. 674 for further details). Each summons, which was signed by the clerk to the committee, showed the full name, designation and address of the person being summonsed. In a further case a witness, while willing to give evidence before a particular committee, was concerned that the type of evidence that he would give might affect his future employment prospects. On that basis the witness was concerned that it should not appear as if he was appearing of his own volition. Accordingly the committee resolved to assist the witness by summonsing that witness to appear before it.

On relatively rare occasions, notably in the cases of the Joint Committee on Prices and the House of Representatives Standing Committee on Expenditure, committees intent upon obtaining evidence from particular individuals or organisations reluctant to provide it have drawn attention to their powers to compel the giving of evidence and to the possibility that failure to comply with their orders might be dealt with as a contempt of the House. This approach has successfully avoided the necessity of resorting to the issue of a summons.

It is unlikely that the House would take any action against, or in relation to, a recusant witness until that witness had refused or neglected to obey a formal summons (see also p. 650). Failure to accept an invitation or request to appear before a committee could not be interpreted as a failure to obey an order of the committee. This view was supported by the Attorney-General in 1951 when the

309 VP 1987-89/1121.

310 S.O. 354; *May*, p. 697.

Senate Select Committee on National Service in the Defence Force reported to the Senate the failure of the Chiefs of Staff of the armed services and other specified officers of the Commonwealth service to appear before it.<sup>311</sup> On 6 February, the Senate Select Committee on National Service in the Defence Force, consisting only of opposition Senators, resolved:

- (1) That the Committee takes a very grave view of the action of the Cabinet in flouting Parliamentary authority by directing that the Chiefs of Staff and other officers should not attend before the Select Committee.
- (2) That such action by the Cabinet is an interference with the freedom of prospective witnesses, and can only be construed as calculated to defeat, hamper and obstruct the purpose which the Senate had in appointing the Select Committee.
- (3) That a statement of the facts be laid before the Senate in a Special Report as soon as possible.<sup>312</sup>

The grounds upon which the Government directed the servicemen and officials not to attend are of interest. In the first instance the Prime Minister indicated that permanent officers of the armed services or the Public Service should not be expected to comment on government policy, and that they would have no alternative but to claim privilege if such opinions were sought. He therefore saw little purpose in their attendance. The committee chairman responded to the Acting Prime Minister that the committee was primarily concerned with factual evidence, not with comment and opinions on government policy, and that it would therefore invite the officials to give evidence. After the officials had received letters inviting them to attend to give evidence the Acting Prime Minister informed the committee that Cabinet considered the officials' participation in the inquiry 'would be against the public interest'. He stated further:

It is quite impossible to draw the line between what your Committee may call "factual" and what is "policy", and it should not be for any official or for the Committee, in the view of the Government on matters which may touch security, to decide whether it is either one or the other.<sup>313</sup>

The failure of the committee to summons the officials was not mentioned but the Attorney-General subsequently referred to it in debate.<sup>314</sup>

In its report to the Senate the committee acknowledged that it was for the Senate itself to decide on any action to be taken. The committee, nevertheless, drew attention to established practice that neither House of the Parliament could punish any breach or contempt offered to it by any Member of the other House. It recommended therefore that insofar as House of Representatives members of Cabinet were concerned, a statement of the facts should be forwarded to that House for its consideration. As to the Senate members of Cabinet the Committee recommended:

... if the Senate decides that a breach of privilege has been committed, the action to be taken by the Senate should be aimed at asserting and upholding the cherished principle of the right of the Senate to the free exercise of its authority without interference from the Cabinet.<sup>315</sup>

The special report was presented to the Senate and a motion for its adoption was moved.<sup>316</sup> The debate on the motion was not concluded when the Senate was dissolved on 19 March 1951. As the matter was not revived the issues were left unresolved. Furthermore, it could be argued, as the committee did, that the failure to issue a summons was not the central issue, as this was not given as a ground for the Government's refusal to permit the officers to attend.

311 S. Deb. (8.3.51)155-7.

312 *Special report from the Senate Select Committee on National Service in the Defence Force*, S2(1950-51)5.

313 S2(1950-51)8.

314 S. Deb. (8.3.51)154-7.

315 S2(1950-51)16.

316 J 1950-51/215,220.

A significant factor in the case was that not only did the committee consist entirely of opposition Senators, but the opposition party held a majority in the Senate at the time. If this had not been so, it can be surmised that events would have been very different. Indeed the committee may not have been appointed. The case perhaps best illustrates the importance of party political realities in any consideration of parliamentary access to information held by the Government.

When a witness is in the custody of any prison, the keeper may be ordered to bring the witness in safe custody for examination as often as the witness's attendance is considered necessary. The Speaker may issue a warrant accordingly.<sup>317</sup>

#### *Answers to questions, provision of information*

A committee, by virtue of its powers to send for persons, papers and records, may demand witnesses answer questions. *May* summarises the position:

A witness is, however, bound to answer all questions which the committee sees fit to put him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has taken an oath not to disclose the matter about which he is required to testify, or because the matter was a privileged communication to him, as where a solicitor is called upon to disclose the secrets of his client; or on the ground that he is advised by counsel that he cannot do so without incurring the risk of incriminating himself or exposing himself to a civil suit, or that it would prejudice him as defendant in litigation which is pending, some of which would be sufficient grounds of excuse in a court of law. Nor can a witness refuse to produce documents in his possession on the ground that, though in his possession, they are under the control of a client who has given him instructions not to disclose them without his express authority. He may, however, request that the whole or part of his evidence should not be published.<sup>318</sup>

A witness may object to a question and the committee may, and frequently does, exercise its discretion in the witness's favour. If the committee needs to deliberate on the objection, the witness and any other strangers present are required to withdraw while it does so.<sup>319</sup> If the objection is overruled, the witness is required to present the oral or documentary evidence required. Failure to provide such evidence may be reported to the House and the witness punished for contempt. It has been suggested that the witness may not have any right of redress before a court even if the witness objects to a question on the grounds that the information sought is outside the committee's terms of reference or the terms of reference are outside the House's constitutional powers.

The April 1989 Procedure Committee report *Committee procedures for dealing with witnesses* proposed the adoption by the House of the following provisions:

The Chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry.

Where a witness objects to answering any question put to him or her on any ground, including the grounds that it is not relevant, or that it may tend to incriminate him or her, he or she shall be invited to state the ground upon which he or she objects to answering the question. The committee may then consider, in camera, whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question,

317 S.O. 361. See Ch. on 'Parliamentary privilege', the 'Bankstown Observer' Case (1955).

318 *May*, pp. 746-7.

319 S.O. 366.

the witness shall be informed of that determination, and of the reasons for it, and shall be required to answer the question in camera, unless the committee resolves that it is essential that it be answered in public. Where a witness declines to answer a question to which a committee has required an answer, the committee may report the facts to the House.

In 1982 the Joint Committee of Public Accounts summonsed the Commonwealth Crown Solicitor to appear before it with a number of files the committee considered would be pertinent to an inquiry. The Commonwealth Crown Solicitor refused to produce the documents sought by the committee, and in answer to a question without notice on 19 October 1982, the then Attorney-General stated that the reason the Crown Solicitor would not produce the documents was on the ground of legal professional privilege.<sup>320</sup>

On the following day the chairman of the committee, by leave, made a statement to the House to the effect that the Commonwealth Crown Solicitor's claim was inappropriate. In addition, the chairman incorporated a legal opinion supporting the committee's argument and the chairman also drew attention to the Greenwood and Ellicott paper which stated:

It also follows from the wide powers which committees can exercise that, if ordered to produce a document which contained communications which were privileged before Courts of law (e.g. between solicitor and client), a person would be in contempt if he did not do so.

Although these privileged communications are usually respected by committees, committees are not restricted in the same way as the Courts.<sup>321</sup>

Committees have at times had to negotiate with witnesses who were reluctant to provide specified evidence. The success of committees in such negotiations has been largely due to them being able to draw attention to their undoubted powers and the means by which they may be enforced.

In 1975, a witness representing his employer before the Standing Committee on Road Safety indicated that a document sought by the committee would be provided only on the condition that it be kept confidential. The committee was not prepared to give that undertaking as it believed it to be in the public interest that the document be published. The witness persisted in his refusal. The committee resolved to call for the document pursuant to its power to call for persons, papers and records. The committee secretary, on the committee's authority, wrote to the managing director of the company acquainting him of the circumstances and drawing his attention to the committee's resolution. The managing director was informed that, if the document requested was not provided within seven days of the date of the secretary's letter, the secretary would have no alternative but to implement the committee's resolution and summons him to appear before the committee with the document. The document was subsequently provided and was published in the committee's report.<sup>322</sup>

In April 1989 the Procedure Committee proposed the adoption of the following resolution to be observed by committees:

Where a committee desires that a witness produce documents or records relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents or records be produced shall be made (whether or not an invitation to produce documents or records has previously been made) only where the committee has made a decision that the circumstances warrant such an order.

320 H.R. Deb. (19.10.82) 2163.

321 PP 168 (1972) 33.

322 PP 156(1976).

*Public interest immunity*

## THE GOVERNMENT'S STRONG POSITION

Commonwealth public servants appearing before committees as private individuals to give evidence unrelated to their past or present duties as public servants, are bound by orders of a committee. They are open to the same penalties as any other citizen if they do not obey. While in principle they are equally bound when summoned to give evidence relating to their official duties, in practice their position is quite different. This is particularly so with respect to failure or refusal to answer a committee's questions. They may, under certain circumstances and on behalf of their Minister, claim public interest immunity, previously known as Crown privilege, that is, they may decline to provide certain oral or documentary evidence on the grounds that its disclosure to the committee would not be in the public interest (see p. 648 for reference to guidelines for public servants). It is doubtful, however, whether a public servant, even on instructions from a Minister or the Government, could refuse or fail to obey a summons to attend before a committee.<sup>323</sup>

The Joint Committee on the Parliamentary Committee System reported that the application of the rules of public interest immunity is 'one of the most vexed questions of committee procedure'. It concluded:

Notwithstanding the authoritative literature and knowledge of the application of the rule in other Commonwealth Parliaments the Committee finds itself unable to offer any clarification of the rules.<sup>324</sup>

Public interest immunity in parliamentary proceedings involves the following considerations:

- the House's power to require the production of documents and giving of evidence is, for all practical purposes, unlimited;
- the House has always acknowledged that it would be contrary to the public interest for certain information held by the Government to be disclosed, and
- the Government, by definition, has the support of the majority in the House and, in practice, on its committees.

Clearly in dealing with a request from the House for information, the Government is in a strong position, stronger than when dealing with similar requests by the courts or by the Senate when it is not controlled by the Government. Only a measure of public (or private) support from government Members, or perhaps public pressure, could force the Government to provide to the House or its committees information or documents which the Government did not want disclosed. Any order or address for the production of such documents or information could not be successful without a majority vote of Members.

There is obvious potential for Governments, by abuse of their strong position in this regard, to undermine the efforts of the House and its committees to call Governments to account. The Joint Committee on the Parliamentary Committee System commented:

It is clear that crown privilege is relied on by governments to protect themselves. The protection of the confidentiality of advice to Ministers or security matters is a shield behind which witnesses sometimes retreat.<sup>325</sup>

323 See Campbell, 'Parliament and the Executive', in Leslie Zines (ed.), *Commentaries on the Australian Constitution*, Butterworths, 1977, p. 100.

324 'A New Parliamentary Committee System', *Report from the Joint Committee on the Parliamentary Committee System*, PP 128(1976)87.

325 PP 128(1976)87.

## COURT PRINCIPLES AND PRACTICE AND THEIR RELEVANCE

Despite the obvious differences between parliamentary and judicial proceedings it is useful to consider the attitudes adopted by the courts towards public interest immunity.

On 9 November 1978 the High Court of Australia, in its decision in the case of *Sankey v. Whitlam and others*, made important statements about the principles involved and set precedents for court practice in relation to it.<sup>326</sup> The decision reflected a continuing trend away from accepting the Minister's certification that information cannot, in the public interest, be disclosed to the courts. The High Court's decision superseded a long-held view (House of Lords in *Conway v. Rimmer* (1968)) that certain classes of important government documents can be excluded automatically from production in court proceedings simply on a plea for secrecy by a Minister or senior public servant, a view often put in relation to parliamentary committee proceedings.<sup>327</sup> The High Court held that the claim of privilege must be considered in the light of the nature of the documents, and not just of their belonging to a class of documents, and that where there was a real doubt as to whether a document should be withheld, a court could look at the document and decide whether it should be produced.

## COMMITTEE PRACTICE

The procedures adopted by the courts for testing a Minister's claim that disclosure would not be in the public interest, that is, by inspection of documents or consideration of the nature of the evidence, while relevant to parliamentary proceedings, could not be given effect to in the House. For example, if the Speaker was given responsibility for viewing documents to test a Minister's claim of public interest immunity, the Speaker's decision could be overruled by a vote of the House.

The reality of the Government's effective capacity to refuse to disclose information or documents to the House or its committees, no matter how important they might be for an investigation, is not lost on Members. Neither the House nor the Senate has ever persisted in its demands for government documents to the point where a charge of contempt has been laid.

The Senate, nevertheless, came close to this position in 1951 (*see p. 649*).

This situation was similarly reflected in the report of the Senate Committee of Privileges on the refusal of officials, at the direction of the Government, to give oral or documentary evidence in 1975 at the Bar of the Senate on the Whitlam Government's overseas loans negotiations. The committee divided on party lines.<sup>328</sup>

In 1967, the Joint Committee on the Australian Capital Territory requested the Department of the Interior to produce all relevant papers in connection with applications to subdivide rural land in the Australian Capital Territory and certain acquisitions. The department, on the advice of the Attorney-General, replied:

Advice now received is that the Minister can properly object to produce to a Parliamentary Committee Departmental documents that disclose the nature of recommendations or advice given by officials, either directly to Ministers or to other officials, in the course of policy making and administration. If it were otherwise, there would be a danger that officials would be deterred from giving full and frank advice to the Government.

On the basis of this advice, the Minister has personally considered what documents should be given to your Committee; he has decided that he must object to the production

326 *Sankey v. Whitlam and others* (1978) 142 CLR 1.

327 PP 168(1972)33-40; *see also* Solicitor-General's letter to the Senate Regulations and Ordinances Committee, quoted in *Odgers*, pp. 548-54.

328 'Matters referred by Senate resolution of 17 July 1975', *Report of Senate Standing Committee of Privileges*, PP 215(1975).



of documents to the Committee that represent recommendations or advice given or to be given to the Government by public officials, for the reason that these are a class of document which it would be contrary to the public interest to disclose.

However, documents that do not come within this category and are relevant to the matters mentioned in your letters of 28th and 30th November, are produced for the Committee's examination. These papers provide the factual information requested by the Committee.<sup>329</sup>

The committee did not press for the other papers requested.

While requests for oral or documentary evidence from government sources have not been pressed to the point of bringing the powers of contempt into force, committees have not lightly accepted objections by officials to presenting certain evidence. While objections have often been readily and immediately accepted, the evidence has at times been so important that the committee has persisted. This persistence has taken the form of requiring the witness or prospective witness to consult with the departmental secretary or Minister, or of the committee or its chairman negotiating with the departmental secretary or the Minister.

In 1977, a subcommittee of the Standing Committee on Expenditure was able to obtain important information, initially refused, after the chairman talked to a witness's superior officer who in turn sought the Minister's approval. No objection was raised to the committee's subsequent publication of the evidence. The same committee was unsuccessful in certain other attempts to obtain information from the Government and brought this to the attention of the House in a report describing its first year of operation. The committee indicated that the Prime Minister had refused to provide it with two sets of documents, even on a confidential basis, on the ground that they were internal working documents. Attention was drawn to the fact that the documents would have helped the committee to determine which matters under investigation it should concentrate upon and in turn would have enabled it to use its limited resources to greater advantage. The committee urged Governments, if necessary, to find ways of minimising restrictions on information to be made available to committees, for example, by providing documents with offending material removed.<sup>330</sup> This latter course has in fact been followed on occasions.

The course mostly followed by committees in an attempt to circumvent the possibility of public interest immunity being claimed is to undertake to treat oral or documentary evidence as confidential. This confidentiality can create difficulties when the committee comes to drafting its report. The risk is run of publishing conclusions and recommendations which on the published evidence may appear unjustified. Apart from this, the public is prevented from drawing its own conclusions on the basis of all the material evidence.

The principles upon which the House and Governments have proceeded to deal with public interest immunity were summarised by Greenwood and Ellicott. They drew on two documents, namely, a letter of November 1953 to the Joint Committee of Public Accounts from the Prime Minister and a letter of September 1956 from the Solicitor-General to the Senate Regulations and Ordinances Committee.<sup>331</sup> These principles have been substantially incorporated in the Government's *Guidelines for Official Witnesses before Parliamentary Committees and related matters*. The principles are:

- the privilege involved is not that of the witness but that of the Crown;

329 Letter from the Secretary, Department of the Interior, dated 21 December 1967.

331 Both are quoted in full in *Odgers*, pp. 545-54.

330 PP 244(1977)20.

- if a witness attends to give evidence on any matter in which it appears that state secrets may be concerned, the witness should endeavour to obtain instructions from a Minister beforehand as to the questions, if any, which the witness should not answer;
- if questions arise unexpectedly in the course of an inquiry, the witness should request postponement of the taking of evidence to enable that witness to obtain the instructions of the appropriate Minister through the departmental secretary;
- if the Minister decides to claim immunity, the Minister should furnish the committee with a certificate to that effect;
- where the witness does not raise any question of immunity, although the matter is obviously one which could be the subject of immunity, the chairman of the committee should stop the evidence being given until the appropriate Minister has an opportunity to consider whether immunity should be claimed or whether a request should be made that the evidence be heard in private<sup>332</sup>;
- if a witness were to supply to the committee a certificate from the appropriate Minister to the effect that the Minister regarded it as being injurious to the public interest to divulge information concerning particular matters, the committee should accept the certificate and not continue further to question a witness on these matters;
- should the committee regard the question of the line of inquiry being pursued as important for its purposes, the chairman should arrange to discuss the matter with the appropriate Minister. The object of the discussion would be to arrange a method of making available to the committee such information as is requisite for its purposes without endangering the security of classified information, and
- before deciding whether to grant a certificate, the Minister should carefully consider the matter in the light of the relevant principles.<sup>333</sup>

It needs to be emphasised that the sixth point, regarding the actual supply of a certificate to a committee, simply recognises that it is the Minister, not an officer, who may claim public interest immunity. It therefore represents sound practice. However, as already indicated, a committee may negotiate further with a Minister or the Prime Minister. Ultimately, it is, in principle, open to the committee to challenge the Minister's certificate in the House by raising the Minister's, or the Government's, behaviour as a contempt of the House.<sup>334</sup>

See also Chapter on 'Papers and documents'.

#### THE ROYAL PREROGATIVE

A committee may not send for papers which, if required by the House itself, would have to be sought by address to the Governor-General.<sup>335</sup> Such is the case when the Royal prerogative is concerned in any paper.<sup>336</sup>

#### *Evidence from State public servants*

State public servants have appeared before House and joint committees in response to an invitation to do so. No summons has ever been issued.

332 The Select Committee on Tourism, on its own initiative, decided not to publish a Cabinet decision and related papers which were attached to a submission. The documents were treated as confidential exhibits. The committee dealt similarly with that part of a submission presented to it which cited a minute from a senior public servant to the Minister.

333 PP 168(1972)37-8.

334 And see Senator Greenwood's later view on the conclusiveness of a Minister's certificate, PP 215(1975)51.

335 May, p. 698.

336 S.O. 317. For details see Ch. on 'Papers and documents'.

By convention and if appropriate, a committee chairman informs each State Premier and the Chief Minister of the Northern Territory of the terms of reference of each inquiry at its outset and requests their co-operation. This may be extended to the Australian Capital Territory after self-government. This co-operation is usually forthcoming but in some cases State Governments have been seen as unhelpful because of either refusal to co-operate or failure to contribute to an inquiry.<sup>337</sup> The extent to which the Premiers insist on being personally involved in negotiations between their States and the committees varies.

As with Commonwealth officials it is accepted practice that State officials will not be asked to comment on government policy. In fact, State Premiers normally insist on agreement to this condition before permitting their officials to give evidence. Requests for personal appearances before committees by State officers are usually directed to the Premier unless a contact officer has been nominated and adequate notice of need for attendance is always given.

The question of State public servants being compelled to give evidence before committees of the House of Representatives poses special problems as constitutional issues are added to those relating to the special role and responsibilities of government officials.

It is unclear in law as to whether the Commonwealth Houses and their committees have the full investigatory powers of the House of Commons or whether they are limited to those matters on which the Commonwealth Parliament may legislate. If the latter were the case, committees of the House could not demand witnesses attend before them and give evidence on matters outside these constitutional limits. Beyond those limits evidence could be sought only on a voluntary basis from any person, including State Government Ministers and officials.

No committee of the Commonwealth Parliament has been prepared to summons a State public servant or Minister to give documentary or oral evidence which they have been unwilling to provide. If such a summons were issued, a State Government could challenge it in the High Court or simply claim public interest immunity. In the highly unlikely event of either House of the Commonwealth Parliament attempting to deal with a State Minister or Government for contempt, the matter would appear to be one to be decided by the High Court.

In 1953, the Parliamentary Standing Committee on Public Works sought the Solicitor-General's advice as to its power to summons a State official to give evidence before it. The Solicitor-General considered the matter so doubtful that the advice given was against making a test case by summoning a State officer<sup>338</sup> (see p. 635).

The relevance of this opinion to other committees' powers is doubtful as the Public Works Committee derives its power from statute, whereas committees appointed by resolution or pursuant to standing or sessional orders, given the appropriate authority, enjoy the powers of committees of the House of Commons as at 1901 by virtue of section 49 of the Constitution.

In light of the unclear constitutional situation, a committee would be prudent to seek advice from the Law Officers before summoning State officials or State Ministers to provide oral or documentary evidence. This was the case in 1982 when the Standing Committee on Aboriginal Affairs was concerned over what it regarded

337 'Lack of Co-operation by the Queensland Government', *House of Representatives Standing Committee on Aboriginal Affairs*, PP 282(1982); 'Telecommunications interception, dated 20 November 1986, incorporating dissenting report', *Joint Select Committee on Telecommunications Interception*, PP 306(1986).

338 Opinion by Solicitor-General, to the Secretary of the Parliamentary Standing Committee on Public Works, dated 16 September 1953.

as a lack of co-operation by a State Government in two of its inquiries. The committee had sought the Attorney-General's advice, which confirmed that the committee did not have the power to require the attendance of State officers. If the resolution of appointment of the committee was to be amended to give the committee this power then the Attorney-General's advice was that serious constitutional questions would arise. The committee felt that it was being hampered in making worthwhile recommendations and it reported its view that the State Government deserved strong condemnation for its lack of willingness to cooperate with the committee.<sup>339</sup>

*Evidence from Members, Senators and parliamentary officers*

Members or Senators may appear as witnesses before committees of the House.

If a Member, including a Minister, volunteers to appear before a House committee the Member may do so and does not need to seek leave of the House. For example, the Prime Minister appeared before the Standing Committee on Environment and Conservation in 1976; in 1977 the Minister for Aboriginal Affairs appeared before the Joint Select Committee on Aboriginal Land Rights in the Northern Territory; and, in 1987 and 1988, it was not uncommon for Ministers to brief general purpose standing committees at the commencement of an inquiry.

*May states:*

A Member who has submitted himself to examination without any order of the House is treated like any other witness.<sup>340</sup>

In 1920, a Senator of his own volition sought consent of the Senate to appear before a House of Representatives committee. The Senate, by motion, granted the Senator leave to attend and give evidence to the committee if he thought fit.<sup>341</sup> However, in 1973 and 1976, Senators appeared before the House of Representatives Standing Committee on Environment and Conservation without seeking leave of the Senate. Their appearance was at their own request.

In 1973, a Member of the House, who was then a Minister, voluntarily gave evidence to the Senate Standing Committee on Social Environment. The Senate did not send a message to the House requesting his attendance as it was clear that he was prepared to give evidence.<sup>342</sup> The Minister did not personally seek leave of the House to appear. In 1981, the Speaker voluntarily appeared before the Senate Select Committee on Parliament's Appropriations and Staffing.

In the same year the chairman of the Senate Standing Committee on Finance and Government Operations wrote to a former Minister for Primary Industry regarding the apparent conflict in evidence given to the Senate committee during the course of its inquiry into the Australian Dairy Corporation and its Asian subsidiaries.<sup>343</sup> The former Minister, who at the time had another portfolio, wrote to the committee. There was still a discrepancy between the sworn evidence of one witness and the recollections of the Minister as expressed in the letter. As a result of further correspondence the Minister made a personal explanation in the House of Representatives. During the course of this personal explanation the Minister stated:

I do not believe it appropriate that a Minister of this House should appear and give sworn evidence before a committee of the other House.<sup>344</sup>

339 VP 1980-83/1161; PP 282(1982).

340 May, p. 741.

341 J 1920-21/153; S. Deb. (15.9.20)4531.

342 Odgers, p. 564.

343 'The Australian Dairy Corporation and its Asian Subsidiaries', *Senate Standing Committee on Finance and Government Operations*, PP 153 (1981) 149-51, 166.

344 H. R. Deb. (7.5.81) 2110.

A copy of this personal explanation was forwarded to the committee and the chairman made a statement to the Senate shortly afterwards.

If a committee desires a Member to appear as a witness, the chairman shall request in writing the attendance of the Member. If the Member refuses to attend or to give evidence or information as a witness, the committee is required to acquaint the House of the circumstances and may not summon the Member again to attend the committee.<sup>345</sup> It is then for the House to determine the matter. These procedures have never had to be implemented in the House of Representatives.

Standing orders of both Houses set down procedures to be followed if a Member of the other House is to be called to give evidence before a committee. If a committee of the House wishes to call before it a Senator who has not volunteered to appear before it as a witness, a message is sent to the Senate by the House requesting the Senate to give leave to the Senator to attend for examination.<sup>346</sup> Upon receiving such a request the Senate may forthwith authorise the Senator to attend if the Senator thinks fit.<sup>347</sup> In 1901 the Senate ordered that a Senator have leave to give evidence before the Select Committee on Coinage if that Senator thought fit<sup>348</sup> and in 1986-87, in response to a request from the House of Representatives<sup>349</sup>, the Senate granted leave to four Senators to attend and give evidence before the House of Representatives Committee of Privileges, if those Senators saw fit.<sup>350</sup> The Senators appeared and gave evidence having sworn oaths/made affirmations.

The same procedures are followed if an officer of the Senate is to be requested to give evidence.<sup>351</sup> Upon receiving such a request the Senate may instruct the officer to attend the committee.<sup>352</sup> The officer is then compelled to attend and give evidence. However, if the officer, having been instructed by the Senate to attend and give evidence before a House of Representatives committee, neglects or refuses to do so, the principle of the complete independence of each House prevents the House of Representatives from dealing with the matter. In such a case the House would acquaint the Senate of the circumstances and it would then be for the Senate to inquire into and, if it thought fit, to punish the offence.<sup>353</sup> If a Senate committee formally sought the attendance before it of an officer of the House the same procedures would apply.<sup>354</sup>

Using the same procedures as those followed by the House<sup>355</sup>, the Senate has requested that Members of the House be given leave to attend and be examined by Senate committees. The House has several times resolved to grant such leave to Members, adding the qualification that the Member may attend and give evidence if the Member thinks fit.<sup>356</sup> In 1913, the House considered a request from the Senate that six named Members, including the Prime Minister, be granted leave to be examined as witnesses before the Senate Select Committee on General Elections, 1913. On motion moved by the Prime Minister, the House resolved to grant such leave only to three Members, all of them opposition Members. The Prime Minister explained that the three government Members whose attendance was requested were not included in the motion because they did not desire to attend.<sup>357</sup> After the

345 S.O. 357.

346 S.O. 359.

347 Senate S.O. 388.

348 VP 1901-02/109,113; J 1901-02/88.

349 VP 1985-87/1365.

350 VP 1985-87/1430; H.R. Deb. (17.2.87) 147.

351 S.O. 359.

352 Senate S.O. 388.

353 *May*, p. 201.

354 S.O. 360; Senate S.O. 387.

355 Senate S.O. 387.

356 S.O. 360; VP 1904/100, 114; VP 1909/189.

357 VP 1913/130; H.R. Deb. (31.10.13)2830-1.

receipt of the message from the House was announced in the Senate, the President stated in answer to a question:

The Senate sent a request to the House of Representatives; but it is no part of our duty, nor have we any right to dictate to the House of Representatives as to what it should or should not do. We have no right to ask it to give reasons as to why it has complied with a part and not the whole of our request.<sup>358</sup>

A similar request for the attendance of Members before another Senate committee was received later on the same day and was dealt with in like manner.<sup>359</sup>

In 1901, the House granted a Member leave, if he thought fit, to attend and be examined by a select committee of the Victorian Legislative Assembly.<sup>360</sup>

In 1975, the Joint Committee on the Parliamentary Committee System formally sought the agreement of the Clerk of the House to the appearance before it of two officers of his department. It was noted that the standing orders concerning the appearance of parliamentary officers before committees were always interpreted liberally. Formal approval was sought in this case because the officers concerned sought to present personal views rather than to speak on behalf of the department. The Clerk gave his approval.

In 1971, at the request of the Committee of Privileges, the Clerk Assistant and the Serjeant-at-Arms appeared before the committee to give their account of the proceedings referred to in the article in the *Daily Telegraph* which had been referred to the committee for examination.<sup>361</sup> In 1973 the Secretary of the Joint Committee on Prices appeared before the Committee of Privileges and in 1987 members of a select committee secretariat gave evidence to the committee. In 1978, the Clerk of the House and the Serjeant-at-Arms appeared before the Senate Committee of Privileges to give evidence in relation to the security of Parliament House.<sup>362</sup>

### Documentary evidence—additional considerations

Documentary evidence, by its very nature, raises issues which do not arise in the case of oral evidence. These separate issues are considered here.

#### *Search for documents*

Greenwood and Ellicott suggested that it would be within the competence of the House 'to authorise an officer to search for specified documents or classes of documents in a particular place and order that they be inspected or copied or brought before the House'.<sup>363</sup> They considered the power to give such an order was conferred on a committee by reason of a power to send for documents. They conceded that this view was arguable and felt that it was a power which should only be used in exceptional circumstances. Even if this power is conferred in the way stated, the most appropriate course of action for a committee faced with a refusal by a witness to produce specified documents would be to acquaint the House of the refusal so that it may make a determination (as with oral evidence<sup>364</sup>). It would be inappropriate for a committee to take direct action to search for a copy or take possession of documents without first informing the House and seeking a determination from it. *May* cites refusal to permit books or papers to be inspected when required by orders of committees as an instance of contempt.<sup>365</sup>

358 S. Deb. (31.10.13)2824.

359 VP 1913/134; H.R. Deb. (31.10.13)2843.

360 VP 1901-02/149.

361 'Article published in *Daily Telegraph*, 27 August 1971', *House of Representatives Committee of Privileges*, PP 242(1971) 39-45.

362 'Appropriate means of ensuring the security of Parliament House', *Report of Senate Standing Committee of Privileges*, PP 22(1978).

363 PP 168(1972)31-2.

364 S.O. 355.

365 *May*, p. 147.

*Withdrawal, alteration, destruction or return of documents*

No document received by the secretary of a committee may be withdrawn or altered without the knowledge and approval of the committee.<sup>366</sup> A document becomes the property of a committee as soon as it is received by the secretary or by a member of the committee itself. It is incumbent on the committee to resolve formally to receive written submissions as evidence at the first available opportunity.

It is standard practice for committee chairmen to ask a witness at a hearing whether the witness wishes to amend his or her submission in any way. Witnesses often use this opportunity to draw attention to inaccuracies or omissions. A committee secretary may not change the substance of a submission at the request of the originator, or on the secretary's own initiative, without the express approval of the committee.

Committees may agree to return documents to witnesses. In 1977, the Standing Committee on Expenditure agreed to return voluminous confidential documents to a department which was concerned about their security. The documents were returned only after the department gave an undertaking that the committee would be granted ready access to them whenever it decided it needed to see them. This action is in accord with the spirit of standing order 39 which states in part:

... on the application of a department any original document laid on the Table, if not likely to be further required by Members, may in the Speaker's discretion be returned to such department.

The Standing Committee on Aboriginal Affairs has returned documents to witnesses on two occasions. In 1984 the secretary received a large number of documents from a witness in the committee's inquiry into the effects of asbestos mining on the Baryulgil community. As the documents arrived after the committee had completed its public hearings and was about to report, the material forwarded was brought to the attention of the committee, but returned to the witness without further investigation. The documents were not admitted into the records of the inquiry and consequently had no status in relation to the inquiry. In 1987 a witness had provided a document to the committee at a public hearing. It was later established that the document was an official document of the Department of Aboriginal Affairs. Having made this discovery the committee requested the document from the department and returned the copy obtained from the witness to the witness. The committee then proceeded to authorise publication of the official departmental copy of the document.

In 1971, the Select Committee on Pharmaceutical Benefits considered destroying highly confidential documents for which it had no further likely use. The committee was advised that caution should be exercised because of problems which might arise if, for example, the House recommitted the committee's report for reasons which related to papers previously destroyed. There is no record in the committee's minutes of any resolution for the destruction of the documents.

It is a sound principle that the House, in considering a committee's report, should have ready access to the evidence upon which the report was based. This would suggest the need for a committee to exercise the utmost caution in considering the destruction of evidence presented to it, even after the House has considered the committee's report.

A committee could resolve to return a submission or other document lodged with it if, for example, the submission was considered irrelevant to the committee's inquiry or if it contained offensive or possibly scurrilous material. A rejected submission would cease to be the property of the committee and would not attract

366 May, p. 705.

privilege. In most circumstances it would be more appropriate for the committee to retain the document, ignore it in its deliberations and not publish it. By virtue of standing order 340, the fact that the document has not been published by the committee or, subsequently, by the House would preclude anyone from publishing the document without the risk of being in contempt of the House. Anyone who published a submission which had not been authorised for publication, pursuant to the Parliamentary Papers Act, would not have the protection of that Act and would therefore not be immune from any legal proceedings for such publication. Whether or not qualified privilege would apply is uncertain. It is highly unlikely that the House would give its protection in legal proceedings to a person who had ignored the desire of its committee that a defamatory document remain unpublished. The committee should advise the originator of the submission of the legal position.

### *Submissions and exhibits*

The record of proceedings of a committee is comprised of the verbatim transcript of evidence taken at hearings by Hansard together with any material ordered by the committee to be incorporated in the transcript. Submissions are usually included in the transcript when a witness appears to give oral evidence at a hearing. If a witness is not invited to give oral evidence, the witness's submission may still be incorporated in a separate volume so that it is readily available to the public. Some items cannot (for example, objects), or need not, be incorporated in the transcript and if they are considered relevant to the inquiry, the committee may order that they be included in the committee's records as exhibits. Any documents may be published later at the committee's discretion. Those submissions which a committee agrees not to publish are usually designated confidential exhibits. Committee reports include a list of submissions and exhibits, both published and confidential.

### **Sub judice convention**

In the case of a matter awaiting or under adjudication in a court of law the House imposes a restriction upon itself to avoid setting itself up as an alternative forum to the courts and to ensure that its proceedings are not permitted to interfere with the course of justice. This restriction is known as the sub judice rule or, more accurately, as the sub judice convention, and is described more fully in the Chapter on 'Control and conduct of debate'.

Committees are bound by the convention. The chairman of a committee, like the Speaker, may exercise discretion as to whether the convention should apply in a given situation but the chairman must have regard to the principles followed by the Speaker in the House<sup>367</sup> and the option open to a committee to take evidence in camera, an option which is not readily open to the House.

If a chairman decides the sub judice convention should apply to evidence being given, he or she may direct that the line of questioning and evidence be discontinued or that the evidence be taken in camera. It would also be open to any other member to require the withdrawal of strangers and Members who are not members of the committee.<sup>368</sup>

If the evidence is taken in camera and it subsequently becomes clear that it does not warrant the application of the sub judice convention, the committee can authorise publication. Equally a committee may publish such in camera evidence once the possibility has passed of its publication interfering with the course of justice.

<sup>367</sup> See Ch. on 'Control and conduct of debate'.

<sup>368</sup> S.O.s 337,338.



In 1975, a witness before a subcommittee of the Standing Committee on Environment and Conservation sought to give evidence relating to the circumstances of a legal action against him in the High Court. The evidence was taken in camera.<sup>369</sup>

### Charges against Members

The standing orders provide that if any information comes before a committee in the nature of a charge against any Member of the House, the committee may only direct that the House be acquainted with the matter. It may not proceed further on the matter. The Senate standing orders contain a similar provision.<sup>370</sup>

In 1975, a witness before the Joint Committee on Pecuniary Interests of Members of Parliament alleged that a Senator, who was a member of the committee, was ineligible under paragraph 44(v) of the Constitution to serve as a Senator. It was claimed that the Senator was a director, manager, secretary and substantial shareholder in a company which had a number of contracts with Commonwealth government departments. The committee resolved that, in accordance with standing orders, the Senate should be acquainted with the relevant evidence. The chairman wrote to the President describing the information brought before the committee and enclosing a copy of the relevant transcript of evidence. The President reported to the Senate, read the committee chairman's letter and tabled the letter and transcript of evidence.<sup>371</sup> The Senator was given leave to make a statement in which the allegations were denied and it was indicated that the Senator had resigned from the committee as the nature of the allegations was such as to place in question the Senator's objectivity in dealing with the issues before the committee.<sup>372</sup> On 22 April 1975, the Senate resolved to refer the matter to the High Court of Australia, in its jurisdiction as the Court of Disputed Returns, and to grant the Senator two months' leave of absence.<sup>373</sup> The Court upheld the Senator's eligibility to serve as a Senator.<sup>374</sup>

### Swearing of witnesses and false evidence

There are no provisions in the standing orders for the swearing of witnesses. Committees of the House which have the power to call for persons, papers and records have the power to administer an oath to witnesses. This power is derived from the House of Commons by virtue of section 49 of the Constitution and on the basis that the United Kingdom Parliamentary Witnesses Act 1871 empowers the House of Commons and its committees to administer oaths to witnesses and attaches to false evidence the penalties of perjury.<sup>375</sup> There has been some doubt cast on whether joint committees have this power<sup>376</sup> but some, such as the Joint Committee on the Foreign Affairs, Defence and Trade, continue to swear witnesses. A witness who refuses to submit to an oath may be dealt with by the House for contempt.<sup>377</sup> Similarly, a witness who gives false evidence before a committee, whether the witness is under oath or not, may be found in contempt of the House.<sup>378</sup> No instance of either contempt has arisen in the House.

369 A Senate committee in 1973 decided not to take evidence from a witness in similar circumstances, *see Odgers*, pp. 252-3.

370 S.O. 358; Senate S.O. 386.

371 J 1974-75/597.

372 S. Deb. (15.4.75)981-4.

373 J 1974-75/628-9.

374 For a detailed discussion of pecuniary and personal interest *see* Ch. on 'Members', and for a more detailed description of the case *see Odgers*, pp. 115-18.

375 Opinion of Solicitor-General, dated 8 August 1941. This view was supported by the Solicitor-General in 1958 in an opinion given to the Senate Select Committee on Payments to Maritime Unions. Greenwood and Ellicott believe there is 'room for doubt' as to whether this is the correct view as the precise limits of section 49 have not yet been determined, PP 168(1972)12.

376 Opinion of Solicitor-General, dated 8 August 1941.

377 *May*, p. 145.

378 *May*, p. 148.

The practice of swearing witnesses has become less common in recent years. Committees may exercise their discretion as to whether they require a witness to take an oath. Under most circumstances it would seem unnecessary in view of the House's power to punish a witness who gives false evidence even when not under oath. If a witness is not sworn, the committee should formally warn a witness that the deliberate misleading of the committee may be regarded as a contempt of the House and broadly indicate the possible consequences.

A reluctant witness, especially one who has been summonsed, should probably be sworn to impress upon him or her the importance and solemnity of the occasion and to ensure that an obligation to tell the whole truth is understood.

A witness who conscientiously objects to taking an oath is given the opportunity to make a solemn affirmation. The oath or affirmation is administered to the witness by the committee secretary. The oath and affirmation used by committees of the House take the following form:

#### Oath

Secretary: Please take the Bible in your right hand. Do you swear that the evidence you shall give on this examination shall be the truth, the whole truth, and nothing but the truth. So help you God.

Witness: I do. So help me God.

#### Affirmation

Secretary: Do you solemnly and sincerely affirm and declare that the evidence you shall give on this examination shall be the truth, the whole truth, and nothing but the truth.

Witness: I do.

An oath need not necessarily be made on the authorised version of the Holy Bible. Every witness taking an oath should take it in a manner which affects his or her conscience regardless of whether a holy book is used or not.<sup>379</sup>

In an effort to obtain evidence from two separate witnesses in the same way, the Senate Standing Committee on Finance and Government Operations wrote to a Minister in the House of Representatives requesting that Minister to give evidence on oath before the committee (*see* p. 658). The Minister responded to the request from the chairman of the committee in the following terms:

While I understand your desire to give evidentiary relativity to matters before your committee, you would also understand that my Ministerial responsibilities are exercised as a Member of the House of Representatives. My responsibility is to that House and it is for that reason that I have felt it best to respond in the way I have and as recorded in *Hansard*. I would suggest to your committee that my personal explanation to the House would have more significance than a statutory declaration.

In the personal explanation to the House the Minister had indicated that his correspondence with the committee 'was written as a Minister in accordance with the several Oaths taken relating to that office'.

After analysing the correspondence and statements the committee commented that the oaths made by the Minister were general oaths relating to office, and did not relate to the truth of the individual statements and correspondence of a Minister. The committee also felt that 'Further on no reading can they be taken as the equivalent of a Minister giving sworn evidence on a particular matter'.<sup>380</sup> The

379 Advice of Attorney-General's Department, dated 16 February 1962, on the swearing in of Members. *See* Ch. on 'Members' as to how the oath may be taken by Members.

380 PP 153 (1981) 167-8.

committee concluded that the oaths which the Minister had taken as a Minister added no evidentiary weight whatsoever to the Minister's recollections on the points in issue in the inquiry.

### Enforcement of committee orders—contempt

Disobedience to orders of a committee given in the proper exercise of its authority is a contempt of the House.<sup>381</sup> It is equally a contempt to 'prevent delay obstruct or interfere with the execution of the orders of committees'<sup>382</sup>, or to behave in such a manner as to obstruct a committee in its efforts to learn the truth of a matter.

The standing orders provide explicitly that, if a witness who is summonsed fails or refuses to attend before a committee, or to give evidence before it, the committee may draw the circumstances to the attention of the House, which shall deal with the matter.<sup>383</sup> *May* specifies those acts or omissions which constitute contempt and which should therefore be brought before the House for its consideration. Among the specific examples of contempt cited by *May* are:

- refusing to answer questions;
- destroying material evidence;
- disobedience to orders for attendance made by committees with the requisite authority;
- disobedience to orders for the production before a committee of papers or other documents;
- prevaricating;
- giving false evidence;
- interrupting or disrupting the proceedings of a committee;
- returning insulting answers;
- appearing in a state of intoxication;
- offering bribes or persuading or inducing another person to procure evidence;
- molestation of witnesses during their evidence in committee;
- refusing to permit books or papers to be inspected when required by order of a committee;
- presenting documents with a view to deceiving a committee;
- wilfully suppressing the truth;
- persistently misleading a committee;
- trifling with a committee;
- avoiding or assisting someone else to avoid being served with a summons;
- removing any record or document from the Clerk's custody or falsifying or improperly altering such records or documents;
- arresting or procuring the arrest on civil process of witnesses or other persons summoned to attend a committee while going to, attending or returning from, such committee, and
- refusing to be sworn or to take some corresponding obligation to speak the truth.<sup>384</sup>

*May* also refers to acts or omissions which the House of Commons has treated as contempt with a view to protecting witnesses and thereby indirectly strengthening its capacity to obtain evidence (see p. 651). It is important however to note that all such complaints need to be tested against the provisions of section 4 of the *Parliamentary Privileges Act 1987* (and see Chapter on 'Parliamentary privilege').

381 *May*, p. 146.

382 *May*, p. 147.

383 S.O. 355.

384 *May*, pp. 145-9, 164-5.

A committee's report to the House on an alleged contempt must be made at the earliest opportunity if the matter is to be given precedence.<sup>385</sup> The report, therefore, might be in the form of a statement to the House by the chairman (*see below*). Despite these requirements it is considered that a committee should seek to form some preliminary view on a matter before bringing it before the House.

In only one instance has the House referred to its Committee of Privileges an alleged breach of privilege of the kind described above. In 1973, the House referred a complaint raised by the Leader of the Opposition concerning a letter allegedly written by the departmental secretary of the Department of Aboriginal Affairs which had been quoted in part in a newspaper article.<sup>386</sup> The committee saw its task as determining whether statements in the letter constituted:

- (a) imputations against or reflections on members of the Standing Committee on the Environment and Conservation in their capacity as members of that committee, and/or
- (b) an intention to withhold information from the committee or an attempt to influence a witness with respect to the evidence he was to give to that committee.<sup>387</sup>

The committee found that portions of the letter had been quoted out of context and its sense distorted, and that there had been no breach of privilege.<sup>388</sup>

Where it is apparent that an offence has been committed and the offence is of such a nature that no explanation of the offender could extenuate it, for example, where a committee has reported that a witness had refused to answer questions, according to *May* the House may proceed at once, without investigation by the Committee of Privileges or perhaps the committee which reported the offence and without hearing the offender, to punish that witness for the contempt.<sup>389</sup>

In 1908, a person who had been twice summonsed refused each time to give evidence to the Select Committee on Stripper Harvesters and Drills. Advice was sought from the Attorney-General but the matter was not raised in the House as a matter of privilege. Rather, the Prime Minister was asked whether he would have the committee converted into a royal commission so that it '... may be armed with the power to compel witnesses to give the information for which it seeks'. Having considered this option and having considered an extension of the committee's powers, the Government decided on the former.<sup>390</sup> However, even the royal commission, the membership of which was identical to that of the committee, failed to obtain some commercial information it sought from several witnesses, having refused to accept the information on a confidential basis. The royal commission reported the recusant witnesses with a view to proceedings being taken against them under the Royal Commissions Act, which provided a penalty for refusal by witnesses to answer any question relevant to the inquiry put to them by commissioners. A prosecution was initiated but was dismissed on the grounds that the questions asked went beyond the scope of the commission.<sup>391</sup>

The view that a select committee could not compel witnesses to answer its questions appears to have been current at the time. The chairman of the Joint Select Committee on Privilege stated in 1908 on the committee's behalf:

... we decline to go through the farce of summoning witnesses who might refuse to answer questions. We were not successful in obtaining the information that we sought,

385 S.O. 96; *see also* Ch. on 'Parliamentary privilege'.

386 VP 1973-74/428-9,431,562.

387 'Letter allegedly written by Secretary, Department of Aboriginal Affairs', *Report of Committee of Privileges*, PP 236(1973)3-4.

388 PP 236(1973)4.

389 *May*, pp. 177-8.

390 H.R. Deb. (3.12.08)2627; H.R. Deb. (4.12.08)2725.

391 *Report from the Royal Commission on Stripper Harvesters and Drills*, PP 24(1909) xix, xxxvii, xxxviii, xlv, xlv; *see also* H.R. Deb. (25.8.09)2562-3.

and under the circumstances we thought it desirable to present our report to the Senate and to this House. Until we have been equipped with the necessary authority to prosecute our inquiry to a successful issue we resign our trust to this House.<sup>392</sup>

The above committees may not have been questioning their legal power to compel witnesses to answer questions but rather the effectiveness of the available means of giving effect to that power, that is, enforcing it. The Joint Select Committee on Privilege found, in the report it tabled in 1908, that the ancient procedures for punishment of contempt of Parliament were 'cumbersome, ineffective, and not consonant with modern ideas and requirements in the administration of justice'.<sup>393</sup>

In 1909, the Senate Select Committee on the Press Cable Service called before it to give evidence Lauchlan Charles Mackinnon of The Argus Proprietary and a representative of the Press Association. When Mackinnon, on oath, refused to answer certain questions, the committee resolved to seek the advice of the Attorney-General as to what steps the Attorney-General would recommend the committee to follow, with a view to obtaining from the witness the information sought by the committee. Noting that the committee had been given power to send for persons, papers and records, the Attorney-General gave the following advice on the committee's power to insist that the witness answer the committee's questions and on action to be taken by the committee should the witness refuse to do so:

For the purposes of the opinion, I assume that the order of reference is within the powers of the Senate (which seems to be beyond doubt), and clearly expresses the particular matters referred. No objections on these points (or on the ground of relevancy, as to which, I think, the decision of the Senate would be final) were taken by the witness; nor can the coercive or punitive action of the Senate (which is limited to committal for the remainder of the session) be questioned if the subject-matter falls within its jurisdiction. (*Stockdale v. Hansard*, R.R. vol. 48, pp. 412,427,441.)

In my opinion, the steps to be taken, should the Committee insist on the evidence being given, are:

- (i) Summon the witness in accordance with the Standing Orders.
- (ii) The Chairman should put such specific questions as he deems essential, and make it clear that the witness is required to answer them.
- (iii) If the witness declines to answer, the refusal should be reported by the Committee to the Senate, which may then deal with the matter as one of privilege under sections 49 and 50 of the Constitution.

The Attorney-General subsequently provided the following advice on the procedure to be followed on the Senate being acquainted with the refusal of the witness to answer the committee's questions:

The Senate shall deal with the matter [S.O. 383]. A motion should be moved by a Member, preferably by the Chairman of the Select Committee, to the following effect: That Mr L.C. Mackinnon, of . . . , Manager of the *Argus* newspaper, do attend at the Bar of this House tomorrow (or as fixed) at . . . p.m.

Serve a summons to attend, and a copy of the resolution. If he does not attend, the Senate should resolve that he be taken into the custody of (the Black Rod) in order that he be brought to the Bar of the House, and that the President should issue his warrant accordingly.

The President (in accordance with what appears to be the practice) should inform him of the cause of his being summoned to attend, and ask him if he has any explanation to make.

After explanation (if any), etc. the witness should be ordered to withdraw. The House then deals further with the matter, by motion, and, if it thinks fit, may resolve That the

392 H.R. Deb. (4.6.08)12 048.

393 'Procedure in cases of Privilege', *Progress Report from the Joint Select Committee on Privilege*, H of R 4(1907-08)4.

refusal of the Witness to answer, etc., is a contempt and breach of privilege of the Senate, and that the said L.C. Mackinnon being guilty of contempt and breach of the privileges of the Senate be for the said offence committed to (His Majesty's Gaol, Melbourne, or such other custody as the Senate may determine) and that the President do issue his warrant accordingly. The term should be during the pleasure of the House, but imprisonment must not extend beyond the session.

Following the receipt by the committee of the Attorney-General's opinion, Mackinnon was again summonsed to appear before the committee, and to produce books, and so on, at which time he answered questions to the satisfaction of members of the committee.<sup>394</sup>

The procedures outlined by the Attorney-General in 1909 could be applied equally in the case of a witness failing or refusing to attend or give evidence before a committee of the House. However in 1913 there was evidence that the doubts still remained. In endeavouring to establish a Committee of Public Accounts, the government chose to introduce a bill to facilitate two matters in relation to the operation of the committee. As the Attorney-General explained:

the committee when appointed could hold its sittings when Parliament would not be sitting, and that it should have the power to take evidence on oath.<sup>395</sup>

There is only one recorded case in Australia in which a recusant witness has been punished by a House of Parliament<sup>396</sup> and that was in 1904 in the Western Australian Legislative Assembly.<sup>397</sup>

A committee may only exercise compulsive powers in relation to the matters which the House has delegated to the committee to investigate by way of its terms of reference. A witness may therefore object to a question which goes beyond the committee's terms of reference. If the committee overruled the objection and reported the matter to the House, the House would presumably have to satisfy itself that the question was admissible on these grounds before considering whether the witness was in contempt.

If a witness objected to a question on these grounds or because the committee's terms of reference were outside the Parliament's constitutional powers, it is doubtful whether he or she would have any right of redress before a court should the House find him or her guilty of contempt and issue a general warrant.<sup>398</sup>

## Protection of witnesses

### *Confidentiality*

A straight-forward protection which can be afforded a witness who wishes to give evidence in confidence is that of taking evidence in camera and treating documents as confidential. Any person who publishes evidence without the committee's authorisation may be found guilty of contempt and punished accordingly (*see* p. 679).

A request by a witness that evidence given remain confidential is often granted but on occasions a committee may consider that the public interest outweighs the private interest of the witness and choose not to accede to the request (*see* p. 652).

Evidence which committees would normally take in camera and not publish because of possibly adverse effects on a witness includes: evidence which might incriminate the witness, industrial secrets, classified material, medical records and

394 *Odgers*, pp. 540-1.

395 H.R. Deb. (16.12.13) 4506.

396 Campbell, *Parliamentary Privilege in Australia*, p. 167.

397 Legislative Assembly of Western Australia, VP 1904/161-2, 182, 193, 216, 307-8.

398 PP 168(1972)15; *see also* Lumb and Ryan, p. 64. In relation to the form of warrants *see* Ch. on 'Parliamentary privilege'.

evidence which may bring advantage to a witness's prospective adversary in litigation. In the last case the witness could be disadvantaged by having the details of a case made known to an adversary or by informing the adversary of the existence of certain evidence beneficial to the witness's case and even how the evidence might be obtained.

In its 1989 report *Committee procedures for dealing with witnesses* the Standing Committee on Procedure proposed the adoption by the House of the following resolutions:

A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in camera, and shall be invited to give reasons for any such application. The witness may give reasons in camera. If the application is not granted, the witness shall be notified of reasons for that decision.

Before giving any evidence in camera a witness shall be informed whether it is the intention of the committee to publish or present to the House all or part of that evidence, that it is within the power of the committee to do so, and that the House has the authority to order the production and publication of undisclosed evidence. Should the committee decide to publish or present to the House all or part of the evidence taken in camera, the witness shall be advised in advance. A member, in a protest or dissent added to a report, shall not disclose evidence taken in camera unless so authorised by the committee.<sup>399</sup>

Witnesses granted permission to give their evidence in camera should be warned that it is within the committee's (or even the House's) discretion to publish the evidence subsequently, if it thinks fit. This discretion would normally be exercised only in cases where the confidentiality of evidence ceases to be important after a certain time or when the evidence given does not warrant the confidential treatment which it was originally thought might be necessary. For example, having heard the evidence the committee might form the opinion that the public interest is greater than the grounds of confidentiality claimed, or, a claim that the evidence is sub judice can not be sustained (*see* p. 662). In both the 34th and 35th Parliaments petitions were received from solicitors requesting leave to take possession of certain "confidential" committee documents in order that they might be produced in court. In each case the House referred the matter to the appropriate committee to determine whether the documents should be presented to the House by the committee for the purpose of the House's granting leave for a subpoena to be issued and served for the production of the documents in court. In the first case the committee recommended that the action proposed be taken and the documents were subsequently presented to the House, the subpoena was served and the House approved the documents being passed to the appropriate court (*see* p. 679). In the second case, while the matter for which the documents were originally required was settled out of court before the committee reported, the committee nevertheless advanced two propositions to the House, namely, that:

- there was a strong presumption that evidence taken in camera, or documents treated as confidential by parliamentary committees should not be released, and
- this presumption was related to the effectiveness in the working of parliamentary committees.<sup>400</sup>

399 VP 1987-89/1121

400 'Release of Tyre Safety Inquiry documents', *Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure*, PP 41 (1989) 6.

*Counsel*

There is no provision in the standing orders nor any statutory provision for a witness before a committee of the House to be represented by counsel. Furthermore, there is no precedent for such representation before the House of Representatives or its committees. Several applications by witnesses to be represented by counsel have been rejected, for example, by the Committee of Privileges<sup>401</sup> and the Standing Committee on Environment and Conservation.

There are precedents, however, for House of Representatives committees to permit witnesses to have counsel present in an advisory capacity during hearings. The witness is required in each instance to seek the permission of the chairman of the committee to consult counsel. The proceedings are temporarily suspended during such consultations. The role of counsel is emphatically that of adviser rather than representative. Counsel have not been permitted, for example, to:

- present evidence in support of a witness or the witness's submission;
- object to procedures or lines of questioning pursued by the committee;
- ask questions of witnesses, or
- attempt to avoid these restrictions by passing notes to the witness or providing the witness with written responses to questions.<sup>402</sup>

These limitations attempt to ensure that the witness answers the questions and presents his or her own evidence while at the same time ensuring that the witness can readily obtain, for example, advice as to legal issues arising in the giving of evidence. Counsel could be permitted, at the committee's discretion, to attend an in camera hearing of a client's evidence.

In 1973, a representative of the Yirrkala people indicated to the Standing Committee on Aboriginal Affairs that they wished to be assisted in the preparation of their submission by a barrister and solicitor, whom they nominated. This person had special ties with, and knowledge of, the Yirrkala people. The committee considered it essential to the success of its inquiry that the assistance be granted. The solicitor sought reimbursement for the cost of necessary air travel and accommodation and a daily fee. The Speaker agreed to these costs being met. As well the solicitor was permitted to address the committee.

In 1970, the Joint Committee on the Australian Capital Territory permitted a firm of solicitors to prepare a submission on behalf of certain licensed grocers because there was no organisation then in existence which could adequately represent them and because of their limited command of English. The grocers alone were permitted to address the committee but were permitted, when necessary, to consult counsel.

In 1985 during the conduct of the Transport Safety Committee's inquiry into passenger coach safety, a solicitor, whose firm had been given the responsibility for preparing and conducting a coach company's case before the Arbitration Commission in a particular award matter, helped prepare that company's submission to the committee. The solicitor was permitted to appear before the committee, together with representatives of the company, as a witness having specialist knowledge of the award provisions, their history and the implications for that company.<sup>403</sup> Also, during the course of the inquiry of the Standing Committee on Aboriginal Affairs into the effect of asbestos mining on the Baryulgil community, former Aboriginal miners and residents of that community had their submissions to the committee

401 See Ch. on 'Parliamentary privilege'.

402 *House of Representatives Standing Committee on Aboriginal Affairs*, Transcript of Evidence (2.12.83)1362.

403 *House of Representatives Standing Committee on Transport Safety*, Transcript of Evidence (5.6.85) 253-328



prepared for them by the New South Wales Aboriginal Legal Service. Officers of that service also appeared before the committee. In 1985 the House of Representatives Select Committee on Aircraft Noise received a submission which was prepared by a solicitor on behalf of a client. In 1987 the Committee of Privileges permitted witnesses to be accompanied by, and to confer with, counsel but, save for seeking clarification on, and making submissions concerning, their own involvement, counsel were not permitted to address the committee directly (*and see* Chapter on 'Parliamentary privilege').

*May* describes the House of Commons practice:

By leave of the House parties whose conduct forms the subject, or one of the subjects, of an investigation by a select committee, or whose rights and interests, as distinct from those of the general public, are directly affected by a public bill or other matter which has been referred to the consideration of such a committee, are sometimes allowed to be heard in person or by counsel before the committee.<sup>404</sup>

The requirement that leave of the House be sought is an important qualification in permitting counsel to be heard. The House could give leave to a committee, from the outset, in the resolution of appointment. Alternatively, the House could grant leave after considering a special report by the committee or simply on motion of its chairman in the House. Orders for the hearing of parties have been made by the House of Commons on the petition of the interested party 'praying to be heard'.<sup>405</sup>

The most modern type of order by the House of Commons, specifying the forms of representation open to parties before select committees, is that which gives the committee leave to 'hear counsel to such extent as they shall see fit; or to hear parties by themselves, their counsel or agents'.<sup>406</sup> *May* also states:

Where a party is given the right to be heard, it seems he is entitled to adduce evidence; but it is otherwise where the hearing is at the discretion of the committee.<sup>407</sup>

The House of Commons has rarely given witnesses leave to be represented by counsel and to cross-examine a witness. The House of Commons Committee of Public Accounts was given leave in 1968 to hear counsel to such extent as the committee thought fit. Leave was limited to the committee's inquiry into a particular matter on which the committee had made a special report to the House.<sup>408</sup>

In 1989 the Procedure Committee proposed the adoption of the following rule:

A witness may make application to be accompanied by counsel or an adviser or advisers and to consult counsel or the adviser(s) in the course of the meeting at which he or she appears. If such an application is not granted, the witness shall be notified of reasons for that decision. A witness accompanied by counsel or an adviser or advisers shall be given reasonable opportunity to consult with counsel or the adviser(s) during a meeting at which he or she appears.<sup>409</sup>

Special arrangements were made during the inquiries of two Senate select committees appointed in 1984 to inquire into the conduct of a judge and into allegations concerning a judge. During the inquiry by the Select Committee on the Conduct of a Judge witnesses were permitted to be accompanied by counsel and were given all reasonable opportunity to consult counsel during their appearance. Counsel were allowed to make statements to the committee in writing or orally, but were not able to cross-examine other witnesses. During the inquiry by the Select Committee on Allegations Concerning a Judge, more detailed rules were adopted. Amongst other things, counsel assisting and counsel for the judge were able to cross examine witnesses (with certain qualifications) and counsel for other witnesses had

404 *May*, p. 699.

405 *May*, p. 699.

406 *May*, p. 699.

407 *May*, p. 700.

408 H.C. Deb. (14.3.68) 1643-6.

409 VP 1987-89/1121.

a similar right, although the committee's statement of rules and procedures included provision that it could stop any secondary cross-examination if it considered it repetitive or oppressive.<sup>410</sup>

### *Protection in legal proceedings*

All witnesses examined before the House, or any of its committees, are entitled to the protection of the House in respect of anything that may be said by them in their evidence.<sup>411</sup> Committee proceedings are proceedings in Parliament for the purposes of the provisions of Article 9 of the Bill of Rights<sup>412</sup> which applies by virtue of section 49 of the Constitution, but the application of which is amplified in the *Parliamentary Privileges Act 1987*. However, a committee which is not properly constituted at the time of a hearing, for instance, when a quorum is not present, does not attract the protection of parliamentary privilege.

In *Chubb v. Salomons* evidence of proceedings was admitted where the House of Commons consented to it being given. The evidence concerned proceedings in the House involving Members, not witnesses before a committee.<sup>413</sup> However, the damage which would be done to the stature and authority of the House if it were in some way to seek to withdraw protection promised to a witness, would be so great as to deter the House from doing so in all but the most exceptional circumstances. Such circumstances might include, for example, breach of the non-disclosure provisions of standing order 340 in relation to a submission containing defamatory material which a committee chose not to publish. If a witness were giving evidence under summons, that is under compulsion, the likelihood of the House electing not to give its protection to that evidence would be even more remote. In such circumstances it must be doubted whether a court would rule the evidence as admissible.

The protection afforded a witness in relation to oral evidence given before a committee also applies to documentary evidence that witness may give.<sup>414</sup> This protection is now conferred explicitly under the *Parliamentary Privileges Act*, but the submission of a written statement is not deemed to be the giving of evidence unless it is so ordered by the committee (section 3).

The protection of parliamentary privilege applies as equally to the evidence of a voluntary witness as it does to the evidence of a witness summonsed by the committee. It is immaterial whether the evidence is given on oath or not.<sup>415</sup>

No officer of the House, or shorthand writer (parliamentary reporter) employed to take minutes of evidence of a committee, may give evidence elsewhere in respect of any proceedings or examination of any witness, without the leave of the House.<sup>416</sup> In 1974, an inquiry was conducted by the Australian Broadcasting Control Board into allegations that certain television stations suppressed television news coverage of a report tabled by the Joint Committee on Prices.<sup>417</sup> The Clerk of the House received a request for the clerk to the committee to make a statement and, if necessary, to give evidence before the board of inquiry. In giving permission for the officer to make a statement it was made clear that the officer could not give evidence in respect of any proceedings before the committee without the leave of

410 For more details see 'Report to the Senate' *Senate Select Committee on the Conduct of a Judge*, PP 168 (1984); 'Report to the Senate' *Senate Select Committee on Allegations Concerning a Judge*, PP 279 (1984).

411 S.O. 362 and see Ch. on 'Parliamentary privilege'.

412 May, p. 88; see also subsection 16 (2) of the *Parliamentary Privileges Act 1987*.

413 *Chubb v. Salomons* (1852) 3 Car. and K 75; see also PP 168(1972)25,29.

414 PP 168(1972)31.

415 Opinion of Solicitor-General, dated 8 August 1941.

416 S.O. 368. See Ch. on 'Papers and documents'.

417 PP 326(1974); VP 1974-75/177.

the House, and that this restriction was imposed by the standing orders of both Houses.<sup>418</sup> Further, in answer to a request that the committee's minutes be made available, it was explained that anyone seeking them would have to obtain the Speaker's approval.<sup>419</sup> This procedure was necessary because, while the minutes had been tabled in the House, they had not been ordered to be printed. The clerk to the committee appeared before the inquiry and read a statement in which no reference was made to any proceedings of the committee and which contained only factual information as to when and to whom copies of the committee's report had been distributed after it had been tabled in the Senate and ordered to be printed.

The absolute privilege derived from the Bill of Rights and enhanced by the *Parliamentary Privileges Act 1987* applies only to oral or written statements which form part of parliamentary proceedings. The *Parliamentary Papers Act* provides absolute protection to the publisher of documents, including submissions and transcripts, whose publication is authorised by the House or its committees. Therefore, a statement made by a witness in the course of committee proceedings is absolutely privileged but the same statement repeated by that witness elsewhere is not. Similarly, the publication of a document presented to a committee is not absolutely privileged unless publication has been authorised by the House or the committee.

However, the publication, whether by order of the House or its committees, of a fair and accurate account of committee proceedings may be held to be protected by the same qualified privilege as applies to such reports of court proceedings, that is, unless malice is proved, the publisher is protected on the ground that the public interest outweighs any disadvantage to individuals.

#### *Protection from arrest, molestation, etc.*

Witnesses are protected from arrest (other than on criminal charges), molestation, tampering or other acts aimed at deterring them from giving evidence before a committee or punishing or penalising them for having given such evidence<sup>420</sup> by sections 12 and 14 of the *Parliamentary Privileges Act 1987*. Section 12 of the Act provides for substantial penalties to be imposed against persons or corporations for offences in respect of witnesses or prospective witnesses. House of Commons committees have occasionally taken evidence from witnesses whose names are not divulged where it is thought that 'private injury or vengeance might result from publication'.<sup>421</sup>

In relation to arrest, the broad position was stated succinctly in a resolution of the House of Commons on 8 March 1688:

It is the undoubted right of this House that all witnesses summoned to attend this House or any committees appointed by it have the privilege of this House in coming, staying and returning.

In 1980, the Committee of Privileges examined and reported on the alleged discrimination and intimidation of D. E. Berthelsen in his public service employment because of evidence given by him to a subcommittee of the Joint Committee on Foreign Affairs and Defence.<sup>422</sup>

418 S.O. 368; Senate S.O. 396.

419 S.O. 320.

420 See Ch. on 'Parliamentary privilege'.

421 May, p. 749.

422 'Alleged discrimination and intimidation of Mr David E. Berthelsen in his public service employment because of evidence given by him to a Subcommittee of the Joint Committee on Foreign Affairs and Defence', *Report of Committee of Privileges*, PP 158(1980)3 and see Ch. on 'Parliamentary privilege'.

The report also suggested the enactment of a Parliamentary Witnesses Protection Act to provide for the prosecution of persons who tamper with, intimidate or discriminate against witnesses who give, or have given, evidence before a committee of the House, and to provide a statutory cause of action in which witnesses who have suffered intimidation or discrimination would have the right to sue for damages those responsible for such acts.<sup>423</sup> The House endorsed the committee's recommendation regarding Berthelsen.

In 1963, a witness informed the Joint Select Committee on Parliamentary and Government Publications, in a sworn statement, that the witness had been insulted and threatened because of evidence given before the committee. Both persons involved were formally summonsed to appear before the committee and were heard under oath. The Presiding Officers were then acquainted with the facts of the case and the action taken by the committee. The committee stated in its report:

The Presiding Officers felt that the Committee had clearly and properly shown that a Committee of the Parliament does not tolerate interference or intimidation in respect of its witnesses and that the Parliament protects witnesses appearing before its Committees to the fullest extent.<sup>424</sup>

In 1975, the *Standing Committee on Environment and Conservation* took action to ensure the safety of witnesses who feared for their well-being after having given evidence to the committee (see p. 680).

A person who appeared as a witness before the *Standing Committee on Aboriginal Affairs* in 1975 subsequently informed the committee that he had been subjected to threats and abusive telephone calls following his appearance. The case was brought to the attention of the Speaker who sought police assistance. The harassment of the witness ceased and no further action was necessary.

In 1985, a witness who had appeared before the *Select Committee on Aboriginal Education* complained, to the chairman of the committee, of intimidation and discrimination as a result of the evidence the witness had given to the committee. The chairman wrote to the Speaker regarding this matter and the Speaker responded indicating that there was no prima facie evidence of intimidation or harassment as a result of the evidence given to the committee by the witness. The Speaker was also of the opinion that there was no question of contempt arising in this matter. The *Standing Committee on Aboriginal Affairs* received a protest from a person who claimed that statements had been made about that person by a member of the committee during public hearings in relation to the committee's Aboriginal homelands centres inquiry. The person concerned requested, in the interest of natural justice, to be given an opportunity to give evidence to the committee to correct the statements made. The committee gave the person an opportunity to appear before it at a subsequent public hearing.<sup>425</sup>

In another instance, in November 1985, the *Standing Committee on Transport Safety* responded to complaints by a witness of intimidation by writing to the person supposedly making the threats. This committee also wrote to the witness's employer, a State government authority. The alleged offender denied making any threats because of evidence given to the committee and the employer assured the committee that there would be no adverse action taken against the witness.

423 PP 158(1980)11-12 and see s. 12 of the *Parliamentary Privileges Act 1987*.

424 *Report of Joint Select Committee on Parliamentary and Government Publications*, PP 32(1964-66)40.

425 'Return to country—The aboriginal homelands movement in Australia', *House of Representatives Standing Committee on Aboriginal Affairs*, Transcript of Evidence (15.10.86) 650-79.

In its 1989 report *Committee procedures for dealing with witnesses* the Standing Committee on Procedure proposed the adoption by the House of the following provision:

Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which has been or may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given or in respect of prospective evidence, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the House.<sup>426</sup>

#### *Other proposals for protection of witnesses or other persons*

In addition to the recommendations on particular issues quoted in this chapter, the Procedure Committee recommended in 1989 that the following provisions be adopted for the assistance or protection of witnesses or other persons:

Reasonable opportunity shall be afforded to witnesses to request corrections in the transcript of their evidence and to put before a committee additional written material supplementary to their evidence. Witnesses may also request the opportunity to give further oral evidence.

Where a committee has reason to believe that evidence about to be given may reflect on a person, the committee shall give consideration to hearing that evidence in camera. Where evidence is given which reflects upon a person, the committee may provide a reasonable opportunity for the person reflected upon to have access to that evidence and to respond to that evidence by written submission or appearance before the committee.

#### *Indemnification of witnesses*

On extraordinary occasions the House of Commons has passed Acts to indemnify witnesses from all penal consequences of their testimony. On those occasions it was thought that such protection, in addition to that normally provided by the House, was necessary to bring about full disclosures.<sup>427</sup>

The United Kingdom Witnesses (Public Inquiries) Protection Act 1892 provides for the protection of witnesses and their indemnification for damage suffered. Section 2 of the Act provides:

Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person for having given evidence upon any inquiry, or on account of the evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable upon conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months.

A court has power to award costs and compensation to the complainant. The Act does not affect the powers or privileges of the House. Greenwood and Ellicott considered the protection given to witnesses by the Act could not be brought within the terms of section 49 of the Constitution<sup>428</sup>, that is, the provisions of the Act would not apply to witnesses before committees of the Australian Parliament. The fact that the legislation applies to all forms of public inquiry would seem to add weight to that view.

426 VP 1987-89/1121.

428 PP 168(1972)30.

427 May, pp. 748-9.

*Media coverage*

Committees have a responsibility to ensure that inaccurate media reports of their proceedings which may adversely affect witnesses, or the committee or its members, are corrected.

A notable instance occurred in 1972, when the Joint Committee on the Australian Capital Territory insisted that a newspaper correct an article in which it was alleged, *inter alia*, that an officer of the Department of the Interior had written the committee's report. The newspaper published on its front page a correction, withdrawal and apology. It apologised unreservedly 'for any reflection that may have been cast upon members and officers of the committee, the Department of the Interior, and officers of the department'.<sup>429</sup> No further action was taken by the committee.

*Payment to witnesses*

At the discretion of the committee, payments may be made to witnesses.<sup>430</sup> Payments would normally cover only the travel and accommodation costs of the witness. Committees of the House adopt the fees and allowances listed in the second schedule of the regulations under the *Public Works Committee Act 1969*. Joint committees, in accordance with Senate standing orders, have regard to the scale of witnesses' expenses prescribed by High Court Rules.<sup>431</sup> Because of the extent to which committees travel and take evidence throughout Australia, payments to witnesses for travel expenses are rarely necessary.

**Publication of evidence***Authorisation for publication of evidence*

Standing order 340 provides for the House, but not for committees, to authorise publication of evidence:

The evidence taken by any select committee of the House and documents presented to and proceedings and reports of such committee, which have not been reported to the House, shall not, unless authorized by the House, be disclosed or published by any Member of such committee, or by any other person.

In practice the House now delegates to committees and their subcommittees, in the sessional orders or the resolutions of appointment, the power to authorise publication of any evidence given before them and any document presented to them.

A committee may limit the release of confidential evidence to particular individuals. This approach may be adopted, for example, to enable individuals to respond to allegations made against them at an *in camera* hearing by another witness.

In 1970, the Joint Committee on the Australian Capital Territory received a request for a copy of evidence taken by its predecessor in the previous Parliament in its inquiry into breath analysing equipment for drivers of motor vehicles. The evidence had not been published and the committee was advised that it had no power to publish it as the evidence had been given before the previous committee. The committee resolved that the Speaker should be requested to take appropriate steps to enable the evidence to be published. As the House was not sitting the President tabled the evidence in the Senate and it was ordered to be printed.<sup>432</sup>

<sup>429</sup> The *Canberra Times*, 16 September 1972.

<sup>430</sup> S.O. 349.

<sup>431</sup> Senate S.O. 318.

<sup>432</sup> J 1970-72/431.

Similar steps were taken in 1972, with respect to the same committee, when the transcript of evidence taken during its inquiry into Australian Capital Territory freehold lands, which was reported on in 1968, was tabled by the Deputy Speaker and the House authorised its publication.<sup>433</sup> In the case of a joint committee, it is only necessary for one House to order that evidence, and so on, relating to the committee, be printed.

The *Parliamentary Papers Act 1908*, inter alia, makes it lawful for a committee of either or both Houses to authorise the publication of any document laid before it or of any evidence given before it. It also grants protection from civil or criminal proceedings to any person publishing any document or evidence published under an authority given pursuant to the provisions of the Act. Section 16 of the *Parliamentary Privileges Act 1987* provides that the term 'proceedings in Parliament' includes 'the formulation, making or publication of a document including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published'.

#### *In camera hearings*

The standing orders provide indirectly for in camera hearings of evidence. Standing order 337 provides that:

When a committee is examining witnesses, strangers may be admitted, but shall be excluded at the request of any Member, or at the discretion of the chairman of the committee, and shall always be excluded when the committee is deliberating.

Standing order 338 provides that:

Members of the House may be present when a committee is examining witnesses; but shall withdraw if requested by the chairman or any Member of the committee; and shall always withdraw when the committee is deliberating.

Thus, while any one member of the committee may require that evidence be heard in camera, the decision to publish the evidence is made by resolution, which requires the support of a majority of the committee members.

Witnesses may request an in camera hearing but a committee will agree only for compelling reasons, for example, industrial secrets, classified material, self-incriminating evidence, evidence likely to involve serious allegations against third parties (see p. 668), a matter which is sub judice (see p. 662) or a matter on which a Minister may otherwise claim public interest immunity (see p. 653). When a witness makes an application for an in camera hearing, the committee decides the issue on the balance of the public interest and any disadvantage the witness, or a third party, may suffer through publication of the evidence.

A committee retains the right, by virtue of the power delegated to it by the House, to authorise disclosure or publication of evidence even if it has initially been taken in camera. Witnesses giving evidence in camera should be warned of this, preferably in writing. If a committee does want to publish in camera evidence, it should inform the witness and consider any objections raised. Resolutions passed by the Senate and which were put before the House in 1987 would make this mandatory. For obvious reasons a committee should authorise publication of in camera evidence only when there is a real and justifiable need or when subsequent events have removed the need for confidentiality, for example, in cases involving the sub judice convention.

433 VP 1970-72/943.

In its 1989 report *Committee procedures for dealing with witnesses* the Standing Committee on Procedures proposed the adoption by the House of the following provisions to be observed by committees of the House:

A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in camera, and shall be invited to give reasons for any such application. The witness may give reasons in camera. If the application is not granted, the witness shall be notified of reasons for that decision.

Before giving any evidence in camera a witness shall be informed whether it is the intention of the committee to publish or present to the House all or part of that evidence, that it is within the power of the committee to do so, and that the House has the authority to order the production and publication of undisclosed evidence. Should the committee decide to publish or present to the House all or part of the evidence taken in camera, the witness shall be advised in advance. A member, in a protest or dissent added to a report, shall not disclose evidence taken in camera unless so authorised by the committee.<sup>434</sup>

The Standing Committee on Expenditure used to hold in camera hearings towards the end of its inquiries to hear evidence from relevant government departments in order to test its preliminary conclusions.<sup>435</sup> The hearings were held in camera to avoid speculation about the committee's recommendations. Departments were informed that the evidence would be published when the committee's report had been tabled.

Section 13 of the *Parliamentary Privileges Act 1987* enables substantial penalties to be imposed for the publication or disclosure of documents directed by a committee to be treated as evidence taken in camera or oral evidence taken in camera or a report of such oral evidence.

The final authority, in the publication of in camera evidence, rests with the House itself. *May* states:

When evidence has not been reported, or if the evidence as reported should not be deemed sufficiently full or complete, the House may order the minutes of evidence to be laid before it. When the evidence is presented in pursuance of such an order, it is usually ordered to be printed.<sup>436</sup>

Although it is highly improbable that the House would insist on the publication of evidence received in camera, a committee cannot give a witness an absolute guarantee that the witness's evidence will not be published.

### *Confidential documents*

The principles applying to requests for hearing evidence in camera apply equally to requests for non-publication of documents and section 13 of the *Parliamentary Privileges Act 1987* applies to documents prepared for the purpose of submission, and submitted to a committee and directed to be treated as evidence taken in camera. In 1975, the Select Committee on Road Safety refused to accept documentary evidence from a witness on a confidential basis, insisting that it was in the public interest that the evidence be published. After protracted negotiations the evidence was provided and was published in the committee's report (*see* p. 652 for details).

Steps are taken to retrieve confidential documents from members of committees of previous Parliaments and from members of any committees which cease to exist,

434 VP 1987-89/1121.

435 PP 244(1977)18-19.

436 *May*, p. 704.



or requests are made that the documents be destroyed. Similar action is taken when a Member ceases to be a member of a committee or a Member of the House.

In 1987, in order to produce documents in court, the Aboriginal Legal Service petitioned the House to obtain access to the evidence presented in an earlier Aboriginal Affairs Committee inquiry. The House resolved that the evidence authorised for publication could be accessed by the Aboriginal Legal Service and used in court (subject to the usual conditions) and that the committee should advise the House on the release of confidential materials provided to the committee during the course of that inquiry. That aspect was referred to the committee and it recommended that the House grant leave to the petitioners or their legal representatives to issue and serve subpoenas for the production to a court of documents tendered by a witness and the Aboriginal Legal Service Ltd during the course of the inquiry. The House took the committee's advice and these documents were passed on to the Supreme Court of New South Wales for use during the hearing as detailed in the petition.<sup>437</sup>

#### *Unusual secrecy provisions*

For considerations of national security unusual secrecy provisions were applied to the Joint Committee on Foreign Affairs when it was appointed in 1952. The committee's resolution of appointment required that it sit in camera, that its proceedings be secret, and that it report only to the Minister for External Affairs.<sup>438</sup> Whenever it reported to the Minister, the committee was to inform the Parliament that it had reported. The Minister decided whether or not the reports should be tabled in the Parliament and printed. These restrictions were modified and ultimately removed from the resolutions of appointment of the committee's successors in subsequent Parliaments. Because of these restrictions and other limitations imposed on the committee, the Opposition refused until 1967 to nominate members to the committee.<sup>439</sup>

Section 92N of the *Australian Security Intelligence Organization Act 1986* places restrictions on disclosure to Parliament of certain matters. In a report to a House the committee shall not disclose the identity of a person who is or has been an officer, employee or agent of the organization or any information from which the identity of such a person could reasonably be inferred. In addition the committee shall not, in a report to either House, disclose classified material or information on the methods, sources, targets or results of the operations or procedures of the organization, the public disclosure of which would, or would be likely to, prejudice the performance by the organization of its functions. The section also requires the committee, before presenting a report to either House, to obtain advice of the Minister as to whether the disclosure of any part of the report would, or would be likely to, disclose a matter referred to.

#### *Unauthorised publication of evidence*

It has been regarded as a contempt for any person, including the originator, to publish or disclose oral or documentary evidence received by a committee until the evidence has been reported to the House or its publication has been authorised by the committee or the House.<sup>440</sup> The restriction on publication of a document,

437 'Certain documents tendered to the Committee during the Baryulgil Community Inquiry', *House of Representatives Standing Committee on Aboriginal Affairs*, PP 355(1986)13. And see Ch. on 'Parliamentary privilege'.

438 VP 1951-53/129.

439 'Observations and history of the Committee', *Report of the Joint Committee on Foreign Affairs and Defence*, PP 4(1978)ii.

440 *May*, p. 704.

including a submission, applies once the document comes into the committee's possession, that is, when it is received by the committee, or by the secretary of the committee (*and see* p. 672).

Committees exercise discretion in dealing with breaches of these provisions. Indeed, none of the occasional cases of unauthorised publication of evidence has been reported to the House. However, committees have at times deemed it necessary to stress to those concerned the seriousness of their action.

An instance of the discretion used by committees arose in 1975. A subcommittee of the Standing Committee on Environment and Conservation acceded to a request by two witnesses that their evidence be taken in camera because of their fears of physical harm from persons whom they wished to name in their evidence. One of the witnesses subsequently disclosed the transcript of evidence to a journalist who published parts of it. The other witness, who had not been consulted on disclosure of the evidence, informed the committee that publication of the evidence may have placed the witness in jeopardy. The Speaker was informed of the circumstances and advice sought. The Australian Federal Police were asked to investigate the possible need for the witnesses to be given protection, but this was found to be unnecessary. The Speaker advised against the incident being raised as a matter of privilege because of concern that further publicity might lead to a greater risk of harm to the witnesses. The Speaker wrote to the witness who disclosed the evidence and to the editor of the newspaper which published it. The Speaker stressed the seriousness of the disclosure, indicated that under normal circumstances the incident may have been raised as a matter of privilege, and stated why no further action had been taken.

It is standard practice for an acknowledgment of receipt of a submission by the committee secretary to contain a warning such as:

It is a serious matter to publish or disclose any document or portion of any evidence, given to a parliamentary committee, before such document or evidence has been reported to the House or until the committee authorises its publication.

From time to time publication has preceded receipt of this warning. In 1979, after considering an apology by prospective witnesses who had published their submission before receiving the warning, the Joint Select Committee on the Family Law Act resolved that a statement on the status of submissions be included in any future advertisements on the committee's inquiry. In 1986, in making a submission to the Joint Select Committee on Electoral Reform, a witness sent the same submission to a newspaper and material from the submission was published before it was received by the committee. The committee corresponded with the witness on the subject of this discourtesy and subsequently resolved to agree to the witness's request that the submission be withdrawn and returned.

If witnesses are examined in public, but publication of the evidence is not authorised, no objection is usually taken to the publication by the press of evidence taken at the hearing provided the reports are fair and accurate. Because it is now standard practice for committees, at the end of each public hearing, to authorise publication of all evidence taken, except confidential documents, this qualification of the non-disclosure provisions now has little relevance.

#### *Expunging of material from evidence*

Part or all of the evidence given by a witness, or questions or statements by committee members, has been expunged from the transcript of evidence and an order made that any such material expunged be disregarded by the press. Advice on this matter to the Joint Committee on Pecuniary Interests of Members of Parliament relied on the provisions of the standing orders of each House, subsection

2(2) of the *Parliamentary Papers Act 1908*, *May* and *Odgers*.<sup>441</sup> Instances cited of evidence which might be expunged included unfair allegations, use of improper language and hearsay. The advice noted that in all cases the references were to the authority of the committee and not of the chairman and therefore recommended that any direction that material be struck out and be disregarded by the press be by order of the committee.

In its report on procedures for dealing with witnesses in 1989<sup>442</sup>, the Procedure Committee recognised the difficulties that could be encountered in respect of orders for material be expunged if, for example, the act of publication occurred prior to or in ignorance of an order that it be expunged. It considered that it would be better practice for committees to consider the evidence being given and that, where it was felt that the evidence was of such a nature that immediate publication would not be appropriate, a committee should give consideration to taking further evidence in camera.

---

<sup>441</sup> S.O. 340; Senate S.O. 308; *May*, p. 702; *Odgers*, p. 503.

<sup>442</sup> VP 1987-89/1121.